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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)

**ORDER GRANTING, IN PART, AND  
DENYING, IN PART, PLAINTIFFS’  
MOTION FOR APPEAL BOND [315]  
AND ORDER TO SHOW CAUSE  
REGARDING SANCTIONS**

**I. INTRODUCTION**

Before the Court is the Plaintiffs’ Motion for an Appeal Bond. (Pl.’s Mot. Appeal Bond, ECF No. 315.) On August 14, 2017, after a fairness hearing, the Court approved a class-action settlement between the parties. (Mins. Mot. Hr’g, ECF No. 305; Settlement Approval Order, ECF No. 306.) Objector Ashley Hammack appealed the Court’s approval of the settlement. (Hammack Not. of Appeal, ECF No. 309.) Hammack has a reputation as a serial objector, and Plaintiffs now seek an order requiring her to post an appeal bond. (ECF No. 315.) Hammack’s filings also misstate, or at least obfuscate, case law, and do not conform to the Local Rules. (Reply, ECF No. 319; Opp’n, ECF No. 316; Hammack Objections, ECF No. 295.) For the following reasons, the Court **GRANTS, in part, and DENIES, in part,** Plaintiffs’ Motion for Appeal Bond. (ECF No. 315.) The Court also **ORDERS**

1 Hammack’s counsel **TO SHOW CAUSE**, in writing only, no later than **February 20,**  
2 **2018**, why the Court should not impose sanctions in the amount of \$250.00 for bad  
3 faith and violations of Rule 11(b) in her filings. (ECF No. 316.)

## 4 II. FACTUAL BACKGROUND

5 The parties agreed to a class-action settlement providing injunctive and  
6 economic relief for all class members who submitted a valid claim form. (Stip.  
7 Settlement, Ex. 1 at 15, ECF No. 275-2.) The Court issued a Preliminary Approval  
8 Order (¶¶ 7–9, ECF No. 288) requiring an extensive notice campaign that involved  
9 use of postal mail, e-mail, publication, and internet banners to inform class members  
10 of the terms of the Settlement, date of the final approval hearing, and the rights of  
11 class members, including their right to object. (Pl.’s Mem. Supp. Mot. Settlement  
12 Approval 24–25, ECF No. 291-1.) By the end of the claims period, 142,502  
13 individuals submitted claims forms. (Pl.’s Mot. 3, ECF No. 315.) Only three  
14 individuals objected: Zeynap Vitale, who did not appeal (*Id.* at 3); Patrick Sweeney, a  
15 serial objector whose appeal was dismissed for failure to pay the appropriate filing  
16 fees (Sweeney Order, ECF No. 312); and Hammack, against whom this appeal bond is  
17 now sought. (Pl.’s Mot., ECF No. 315.)

18  
19 On August 14, 2017, the Court held a final approval hearing and evaluated the  
20 settlement between class members, as represented by Enzo Forcellati and Lisa  
21 Roemmich, and Hyland’s, Inc., Standard Homeopathic Laboratories, Inc., and  
22 Standard Homeopathic Company (collectively, “Defendants”). (ECF No. 305.) The  
23 Court determined that the Notice required by the Preliminary Approval Order (ECF  
24 No. 288) had been “successfully implemented and satisfied the requirements of Fed.  
25 R. Civ. P. 23 and due process.” (¶ 4, ECF No. 306.) None of the objectors attended  
26 the fairness hearing. (Min. Mot. Hr’g, ECF No. 305.) The Court overruled the three  
27 submitted objections and found the Settlement to be “fair, reasonable, and adequate.”  
28

1 (Settlement Approval Order, ECF No. 306.) That same day, the Court approved the  
2 settlement. (*Id.*)

3 Subsequently, Hammack appealed. (Not. of Appeal, ECF No. 307.) Hammack  
4 and her counsel have earned themselves a reputation as serial objectors. (ECF No.  
5 315.) This is evidenced by her repeated filing of objections and appeals—and their  
6 repeated rejection. *See Lerma v. Schiff Nutrition Int’l, Inc.*, 3:11-cv-01056-MDD,  
7 2016 U.S. Dist. LEXIS 24748, at \*3 (S.D. Cal. Feb. 29, 2016.) (finding Hammack’s  
8 objections meritless); *see also Vincent v. People Against Dirt, PBC*, Case No. 7:16-  
9 vb-06936-NSR (S.D.N.Y. Sept. 2, 2016) (entirely overruling Hammack’s objections);  
10 *Rapoport-Hecht v. Seventh Generation, Inc.*, Case No. 7:16-cv-09087-KMK  
11 (S.D.N.Y. Nov. 14, 2014) (disregarding Hammack’s objection). Hammack objected  
12 because: (1) class counsel failed to post their motion for attorneys’ fees on the class  
13 action website; (2) the attorneys’ fees requests were too high; and (3) the class  
14 representative incentive award of \$5,000 was too high. (Hammack Not. of Objection  
15 1–2, ECF No. 295.)  
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17 On November 2, 2017, Plaintiffs moved for an order requiring Hammack to  
18 post an appeal bond, and Hammack opposed. (ECF Nos. 315–16.) After considering  
19 the papers filed in connection with the Motion, the Court deemed the matter  
20 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R.  
21 7-15.

### 22 III. LEGAL STANDARD

23 “In a civil case, the district court may require an appellant to file a bond or  
24 provide other security in any form and amount necessary to ensure payment of costs  
25 on appeal.” Fed. R. App. P. 7. The Court has discretion to determine when an appeal  
26 bond is appropriate, as well as its amount. *Fleury v. Richemont N. Am., Inc.*, No. C-  
27 05-4525 EMC, 2008 WL 4680033, at \*4 (N.D. Cal. Oct. 21, 2008). When reviewing  
28 objections to the amount of an appeal bond, an abuse of discretion standard applies.

1 *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 955 (9th Cir. 2007) (citing *A &*  
2 *M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (as amended)).  
3 “However, the meaning of the phrase ‘costs on appeal’ is a question of law that [the  
4 court of appeals] review[s] de novo.” *Azizian*, 499 F.3d at 955.

#### 5 IV. DISCUSSION

6 Rule 7 of the Federal Rules of Appellate Procedure provides that the district  
7 court may require an appellant to post a bond in order to ensure payment of appellate  
8 costs. *See* Fed. R. App. P. 7. Congress intended appeal bonds to “protect against the  
9 risk of nonpayment by an unsuccessful appellant.” *Fleury*, 2008 WL 4680033, at \*6.

##### 10 A. Appropriateness of Granting an Appeal Bond

11 The appropriateness of a bond is analyzed in light of (1) the appealing party’s  
12 financial ability to post a bond, (2) the risk that the appealing party would not pay  
13 costs, if the appeal fails, and the (3) the likelihood that the appealing party will lose  
14 their appeal.<sup>1</sup> *Fleury*, 2008 WL 4680033, at \*6. Many “[c]ourts treat with particular  
15 disapproval the objections and appeals of ‘professional objectors’ . . . .” *In re*  
16 *Checking Account Overdraft Litig.*, No. 1.09-MD-02036-JLK, 2012 WL 456691, at  
17 \*2 (S.D. Fla. Feb. 14, 2012). However, the Ninth Circuit does not allow courts to  
18 consider an individual’s status as a professional objector in determining the  
19 appropriateness of an appeal bond. *Fleury*, 2008 WL 4680033, at \*6 (citing *Azizian*,  
20 499 F.3d at 960) (explaining that “Rule 7 is not intended to provide a penalty to  
21 address the frivolity of an appeal”). Even so, review of these three factors leaves the  
22 Court confident that an appeal bond is appropriate in this case.<sup>2</sup>

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26 <sup>1</sup> Plaintiffs and Hammack refer to these factors interchangeably as the *Fleury* and *Azizian* factors.  
(ECF Nos. 315–317.)

27 <sup>2</sup> While Hammack now argues against granting the appeal bond at all (ECF No. 316), she previously  
28 acknowledged the appropriateness of an appeal bond, limiting her dispute to its amount. (Dec. of  
Timothy J. Peter ¶ 4, ECF No. 315-1.)

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2 1. *Financial Ability to Post Bond*

3 The objector bears the burden of establishing that she cannot post an appeal  
4 bond. *Miletak v. Allstate Ins. Co.*, No. C 06-02778 JW, 2012 WL 3686785, at \*2  
5 (N.D. Cal. Aug. 27, 2012); *see also Fleury*, 2008 WL 4680033, at \*7 (finding that  
6 failure to establish an inability to pay a bond typically weighs in favor of awarding the  
7 bond). Hammack provided no such evidence and does not address this in her  
8 opposition. (ECF No. 316); *cf. Glasser v. Volkswagen of Am.*, Case No. CV 06-2562  
9 ABC (JTLx), 2010 WL 11545660, at \*2 (C.D. Cal. May 20, 2010) (finding that  
10 failure to address financial status requires bond). Additionally, Hammack’s history of  
11 paying appeal bonds demonstrates that she has the financial ability to post a bond.  
12 *See, e.g., Lerma*, 2016 U.S. Dist. LEXIS 24748, at \*3 (requiring Hammack to post an  
13 appeal bond for her meritless objections). Thus, this factor strongly favors granting  
14 the bond.

15 2. *Risk of Non-Payment*

16 The second factor, risk of non-payment, weighs in favor of granting an appeal  
17 bond when collecting costs after a failed appeal would be difficult. *See Fleury*, 2008  
18 WL 4680033, at \*7. If an objector resides outside of the state or circuit where an  
19 appeal was filed, then an appeal bond is likely appropriate. *Id.* at \*7 (finding that the  
20 risk of non-payment favored granting the bond because the objector did not reside in  
21 California or the Ninth Circuit); *cf. Miletak*, 2012 WL 4686785, at \*2 (“[T]he  
22 difficulty of collecting payment post-appeal . . . is neutral because [the] Objector . . . is  
23 a resident of California.”). Here, Hammack lives in Texas, outside of both the state of  
24 California and the Ninth Circuit. (Not. of Objection, ECF No. 295.) Thus, this factor  
25 also weighs in favor of the appeal bond.  
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1                                   3. *Merits of the Appeal*

2           The final consideration in determining whether an appeal bond should be  
3 awarded is the merits of the appeal in question. *Fleury*, 2008 WL 4680033, at \*21.  
4 This factor also mandates that she post bond. *See In re General Elec. Co. Sec. Litig.*,  
5 998 F. Supp. 2d (S.D.N.Y. 2014) (quoting *T.C. Metals, LLC v. Dempsey Pipe &*  
6 *Supply, Inc.*, 592 F.3d 329, 341 (2nd Cir. 2010)) (“An argument is ‘frivolous’ . . .  
7 when it is ‘totally lacking in merit, framed with no relevant supporting law,  
8 conclusory in nature, and utterly unsupported by the evidence.’”)

9           She first contends that class counsel did not post its fee motion on the class-  
10 action site in a timely manner. (ECF No. 295 at 2.) She offers no evidence to support  
11 this accusation, however. (*Id.*) Moreover, Plaintiffs assert that they posted the motion  
12 for attorneys’ fees on the website one day after its filing. (ECF No. 315 at 10.) Thus,  
13 this objection lacks the factual basis necessary to entertain the possibility of winning  
14 on appeal. Even if Hammack provided evidence to support her theory, a delay of one  
15 day in posting the motion on the settlement website would not support a strong case  
16 for an appeal.

17           She also objects to the attorneys’ fees requested. (ECF No. 295 at 2.) She  
18 argues, based on a single sentence in *Hanlon v. Chrysler*, 150 F.3d 1011, 1029 (9th  
19 Cir. 1998), that attorneys’ fees cannot be awarded in excess of 25% of the total  
20 amount recovered. (ECF No. 295.) However, Hammack ignores the context in which  
21 the *Hanlon* court established the 25% benchmark for attorneys’ fees. The 25%  
22 benchmark applies where the court employs the common fund method of calculation.  
23 *See Hanlon*, 150 F.3d at 1029; (ECF No. 295 at 2.) Directly before the sentence  
24 Hammack quotes, *Hanlon* acknowledges that there are two common methods for  
25 determining attorneys’ fees in class actions, and that, in injunctive relief class actions,  
26 such as this, courts are more likely to use a lodestar calculation because “there is no  
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1 way to gauge the net value of the settlement or any percentage thereof.” *See Hanlon*,  
2 150 F.3d at 1029. Thus, her objection runs contrary to the law and lacks merit.

3 Finally, Hammack objected to the \$5,000 incentive award given to the class  
4 representatives because it was too high. (ECF No. 295 at 3.) However, courts in the  
5 Ninth Circuit have repeatedly found \$5,000 to be a presumptively reasonable  
6 incentive award. *See, e.g., In re Mego Fin. Corp.*, 213 F.3d at 457 (approving \$5,000  
7 incentive award); *In re Toys “R”Us-Del, Inc. FACTA Litig.*, 295 F.R.D. 438, 470-72  
8 (C.D. Cal. 2014) (internal citation omitted) (finding a \$5,000 incentive award to be  
9 “just and reasonable under the circumstances”). Hammack provides no legal authority  
10 in support of her position. (*See* ECF No. 295 at 3.)

11 These three contentions provided the foundation for Hammack’s entire appeal.  
12 *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (generally limiting issues  
13 on appeal to those issues raised in the lower court). Her objections lack substantive  
14 merit and indicate a very high probability that she will lose her appeal. Accordingly,  
15 this factor also supports granting the appeal bond.

16 On balance, then, all three of the *Fleury* factors weigh in favor of requiring  
17 Hammack to post an appeal bond.

### 18 **B. Appropriate Amount of the Appeal Bond**

19 “[T]he term ‘costs on appeal’ in Rule 7 includes all expenses defined as ‘costs’  
20 by an applicable fee-shifting statute,” in addition to those costs available under Rule  
21 39(e). *Azizian*, 499 F.3d at 958. Rule 39(e) costs include: (1) preparation and  
22 transmission of the record; (2) the reporter’s transcript; (3) premiums for a bond to  
23 preserve rights pending appeal; and (4) the notice of appeal filing fee. Fed. R. App. P.  
24 39(e). The proper scope of an appeal bond has long divided the courts, and it  
25 continues to do so. *See In re Netflix Privacy Litig.*, Case No. 5:11-CV-00379-EJD,  
26 2013 WL 6173772, at \*4 (N.D. Cal. Nov. 25, 2013) (acknowledging the diverging  
27 views). However, citing *Azizian*, an unpublished Ninth Circuit opinion recently  
28

1 clarified that “[t]he district court may not include in an appeal bond *any* expenses  
2 beyond those referenced in Fed. R. App. P. 39 unless such expense may be shifted  
3 pursuant to another statute.” *In re Magsafe Apple Power Adapter Litigation*, 571 Fed.  
4 Appx. 560, 563 (9th Cir. 2014) (emphasis added).

5 While Plaintiffs cite extensive support for their position that the substantial  
6 Settlement Administration costs should be included in the appeal bond, they do not  
7 provide any evidence that a cost-shifting statute exists which provides for inclusion of  
8 settlement administration fees. (ECF Nos. 315, 317) Moreover, almost all supporting  
9 cases cited (*See* ECF Nos. 315, 317) predated the Ninth Circuit’s decision in *Magsafe*.  
10 The one exception is *Retta v. Millennium Products, Inc.*, No. 2:15-cv-01801-PSG-  
11 AJW, ECF No. 152 (C.D. Cal. Dec. 20, 2017), which did occur after *Magsafe*;  
12 however, in that case, the appeal bond went unopposed by the objectors.

13 In contrast, here, Hammack raised *Magsafe* in opposition. (ECF No. 316.)  
14 Because it is unpublished, *Magsafe* is not binding on this court. L. R. App. P. 36-3.  
15 However, it remains persuasive and is particularly consequential in this case, because  
16 it provides insight into the Ninth Circuit’s intended interpretation of *Azizian*.  
17 Accordingly, the Court follows *Magsafe* and declines include the substantial  
18 settlement administration costs, totaling \$76,642 (Luchessi Dec., ECF No. 315-4 at 2),  
19 in the appeal bond because Plaintiffs do not provide a statute allowing these fees to be  
20 shifted. *See Magsafe*, 571 Fed. Appx. at 563.

21 However, Plaintiffs established \$2,500.00 in litigation-related fees (ECF No.  
22 315 at 13) that fall within the scope of Rule 39(e). Fed. R. App. P. 39(e); *see also*  
23 *Shulken v. Wash. Mut. Bank*, No. 09-CV-02708-LHK, 2013 WL 1345716 (N.D. Cal.  
24 Apr. 2, 2013) (noting Rule 7 does not even require a specific showing of alleged  
25 costs). Accordingly, the Court **GRANTS** Plaintiffs’ Motion, in part, and sets the  
26 appeal bond at \$2,500. Hammack must post this bond within 14 days of the date of  
27 this Order.  
28



1 **C. Sanctions**

2 “When assessing the merits of an objection to a class action settlement, courts  
3 consider the background and intent of objectors and their counsel, particularly when  
4 indicative of a motive other than putting the interest of the class members first.”  
5 *Chambers v. Whirlpool Corp.*, Case No. SA CV 11-1733 FMO (JCGx), 2016 WL  
6 9451360, at \*2 (C.D. Cal. Aug. 12, 2016) (internal citation omitted). When an  
7 objector demonstrates bad faith or vexatious conduct, this also should be taken into  
8 consideration. *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270, 1271 (W.D.  
9 Wash. 2013). Throughout her filings, Hammack repeatedly mischaracterized and  
10 inaccurately cited case law (ECF No. 295 at 2 (mischaracterizing *Hanlon*); attacked  
11 the ethics of Plaintiffs’ counsel (ECF No 316. at 5 (accusing Plaintiffs’ counsel of  
12 improper motivation)), disregarded the Local Rules (ECF No. 316 at 1 (demonstrating  
13 failure to comply with local rules)), and misstated facts (*Id.* at 6 (falsely indicating  
14 Hammack or her counsel attended the fairness hearing)).

15 Under Rule 11 of the Federal Rules of Civil Procedure, by signing a pleading,  
16 an attorney certifies (1) that the information therein is not being presented for an  
17 improper purpose, (2) that the legal contentions put forward are warranted by existing  
18 law, (3) that the factual contentions put forward have evidentiary support, and (4) that  
19 denials of factual contentions are warranted. Fed R. Civ. P. 11(b). When the conduct  
20 of a party or their counsel violates these rules, the Court may, on its own initiative,  
21 institute sanctions against them. *See* Fed. R. Civ. P. 11(c)(3). In addition, under its  
22 own inherent authority, the Court may impose sanctions for displays of bad faith.  
23 *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). In this instance, sanctions are  
24 warranted under both authorities.

25  
26 First, the Plaintiffs correctly pointed out that filings by Hammack’s counsel  
27 repeatedly failed to comply with the Court’s Local Rules. (ECF No. 319 at 5.) Both  
28 Hammack’s Notice of Objection (ECF No. 295) and subsequent Opposition to

1 Plaintiffs' Motion for Appeal Bond (ECF No. 316) are on unnumbered paper. *See*  
2 C.D. Cal. L.R. 11-3.2 ("All documents shall . . . be numbered on the left margins . . .  
3 ."). Counsel also repeatedly failed to provide identifying information on the caption  
4 page of her filings. (ECF No. 295, 316.) This is a standard requirement in the Court.  
5 C.D. Cal. L.R. 11-3.8. Particularly in light of the number of actions of this type that  
6 Hammack and her counsel previously brought, there is no legitimate explanation for  
7 her disregard of the Local Rules.

8 The Court addressed above Counsel's mischaracterization of the law in *Hanlon*  
9 in Hammack's original Objection (ECF No. 295 at 2), ignoring its context and  
10 selecting choice sentences that take on very different meanings in their full context.  
11 *See Hanlon*, 150 F.3d at 1029.

12 Additionally, in Hammack's Opposition, Counsel falsely implied that class  
13 counsel relied only on "one non-precedential district court opinion imposing bonds to  
14 cover settlement administration costs." (ECF No. 316.) Plaintiffs cited to at least  
15 three district court cases where such costs were awarded as part of an appeal bond.  
16 (ECF No. 315.) Hammack's counsel also stated in her Opposition that she objected at  
17 the fairness hearing, but neither she nor Counsel attended that hearing.  
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19 Taken together, Counsel's disregard for the Local Rules and misstatements of  
20 law and fact demonstrate the type of subjective bad faith and Rule 11 violations  
21 warranting sanctions. Accordingly, the Court **ORDERS** that, absent a showing of  
22 cause to the contrary, Hammack's counsel must pay a fine in the amount of \$250.00.

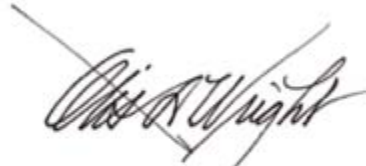
## 23 V. CONCLUSION

24 For the reasons discussed above, the Court **GRANTS**, in part, and **DENIES**, in  
25 part, Plaintiffs' Motion for Appeal Bond. The Court **ORDERS THAT** Objector  
26 Ashley Hammack shall post an appeal bond in the amount of \$2,500 within **14 days**  
27 of the entry of this Order. The Court also **ORDERS** Hammack's counsel to **SHOW**  
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1 **CAUSE**, in writing only, no later than **February 20, 2018**, why the Court should not  
2 sanction Hammack's counsel in the amount of \$250.00 for violations of Rule 11(b).

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4 **IT IS SO ORDERED.**

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6 February 5, 2018



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8 **OTIS D. WRIGHT, II**  
9 **UNITED STATES DISTRICT JUDGE**

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