UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-3936 PA (SSx)	Date	December 20, 2013
Title	Gary Redwen, et al. v. Sino Clean Energy, Inc., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	N/A	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - ORDER

Before the Court is a Motion to Impose an Appeal Bond filed by plaintiff Perritt Micro Cap Opportunities Fund ("Lead Plaintiff"). [Docket No. 100.] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for December 2, 2013, is vacated, and the matter taken off calendar.

A fairness hearing was held on July 1, 2013, and the Court granted Lead Plaintiff's Motion for Final Approval of Settlement, Plan of Allocation, and Class Certification and the Motion for Award of Attorneys' Fees and Expenses. Objector Larry Vincent ("Vincent") had filed an Objection to the Proposed Settlement, but did not appear at the hearing. Vincent appealed the Order granting the Motion for Final Approval of Settlement. Lead Plaintiff now seeks to require Vincent to post an appeal bond.

Vincent has not filed an Opposition to the Motion to Impose an Appeal Bond. "The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion." Local Rule 7-12. Furthermore, the Court finds that Lead Plaintiff's motion should be granted based on the merits.

I. Factual and Procedural Background

On May 6, 2011, this shareholder class action was filed, alleging violations of the federal securities laws by Defendants. The First Amended Complaint asserted claims on behalf of investors who acquired the common stock of Sino Clean Energy pursuant to the December 21, 2010 Registration Statement and Prospectus for the secondary offering of 5,465,000 shares of the Company offered at a price of $5.25 per share (the "Offering"). On March 5, 2012, Lead Plaintiff filed the Second Amended Class Action Complaint ("SAC") which added substantial factual detail in support of the claims asserted for violations of Sections 11 and 15 of the Securities Act.

The Stipulation and Agreement of Settlement ("Settlement Agreement") provides for the payment of $2,000,000.00 into an escrow account to be distributed pursuant to the terms of the

agreement. Following preliminary approval of the settlement agreement in March, the class was notified of the settlement and its terms. Five putative class members notified the Claims Administrator of an intent to opt out and only one putative class member, Vincent, objected to the Settlement Agreement. In addition, Vincent did not establish membership in the Class. Gilardi & Co. LLC, the Claims Administrator, researched all claim packages received in this case and found no Proof of Claim for Vincent.

Vincent objected to the $20 minimum claim amount and the award of attorneys' fees. The Court overruled his objections. Vincent then filed a notice of appeal. [Docket No. 97.] In this motion, Lead Plaintiff asks the Court to impose an appeal bond of $17,410.50.

II. Analysis

"'[T]he district court may require an appellate bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.'" Azizian v. Federated Dept. Stores, Inc., 499 F. 3d 950, 954-955 (9th Cir. 2007) (quoting Fed. R. App. P. 7). "'In determining whether a bond should be required, the Court should consider: (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay the appellee's costs if the appeal loses; and (3) merits of the appeal.'" Shames v. Hertz Corp., No. 07-2174, 2013 WL 3155019, at *1 (S.D. Cal. June 18, 2013) (quoting Fleury v. Richemont N. Am., Inc., 05-4525, 2008 WL 4680033, at *6-7 (N.D. Cal. Oct. 21, 2008)).

Each of these factors favors imposing an appeal bond. First, the small number of objections raised the presumption that the settlement was adequate. Additionally, Vincent's appeal does not appear to have merit because he failed to establish that he is a Class member and did not file a claim to a share of the recovery. Furthermore, Vincent is represented by The Law Office of Gary Sibley, who is a serial objector according to Lead Plaintiff.

Lead Plaintiff does not know how Vincent is employed. However, it is Vincent's burden to show he lacks the financial ability to post a bond. Miletak v. Allstate Ins. Co., C 06-03778 JW, 2012 WL 3686785, at *2 (N.D. Cal. Aug. 27, 2012) (absence of evidence that the objector is unable to bond "weighs in favor of imposing an appeal bond"). Therefore, this factor also weighs in favor of imposing a bond.

Courts have found that imposition of a bond is favored when, like here, most or all of the objectors are outside of this District. See Shames, 2013 WL 3155019, at *1 (citing Fluery, 2008 WL 4680033, at *7). The district court in Dennings found that there is "a risk of non-payment of appeal costs given that both objectors live in Texas, and it may therefore be difficult to enforce a cost order imposed upon them." Dennings v. Clearwire Corp., 928 F.Supp.2d 1270, 1272, 2013 WL 945267 at *2 (W.D. Wash. March 11, 2013). Here, this factor weighs in favor of requiring a bond because Vincent and his lawyer are in Texas. Thus, the Court concludes that a bond is appropriate.

In order to determine the amount of the bond, the Court looks to Rule 7, which allows courts to impose a bond for "costs on appeal." Fed. R. App. P. 7. Here, Lead Plaintiff is not including attorneys' fees as a basis for the requested bond. The appeal bond is based on the costs of the appeal, including increased administrative costs caused by Vincent's appeal.

The Ninth Circuit has held that the Rule 7 costs on appeal include those identified in Federal Rule of Appellate Procedure 39(e), which include preparation of the record, reporter's transcript, and filing fees. Azizian, 499 F.3d at 958 ("We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal."). Here, the costs of preparing and filing the record and briefs and the cost of the reporter's transcript are estimated to be $900.00. (Declaration of Thomas C. Bright ("Bright Decl.") at 4).

In addition, "courts have interpreted Rule 7 broadly to include increased expenses in settlement administration and administrative costs." Dennings, 928 F.Supp.2d at 1272; see also Miletak, 2012 WL 3686785, at *2 (finding "good cause" supported including $50,000 in "administrative costs" incurred in order "to continue to service and respond to class members' needs pending the appeal"); but see In re Bayer Corp. Combination Aspirin Products Mktg. & Sales Practices Litig., 09-MD-2023 BMC, 2013 WL 4735641, at *4 (E.D.N.Y. Sept. 3, 2013) (rejecting request to impose additional amount); In re Toyota Motor Corp. Unintended Acceleration Mktg., 2013 WL 5775118 (C.D. Cal. Oct. 21, 2013).

In these circumstances, the expected additional administration costs of $16,510.50 are reasonable. These costs are attributable to the delay caused by Vincent's appeal. The claims administrator has estimated, based on previous experience, that if the appeal further extends the time period of the settlement administration, the additional fees and expenses will be approximately $1,485.00 per month (Declaration of Lara McDermott at 9). The median length of appeals in the Ninth Circuit is 15.3 months (Bright Decl. Ex. A (2012 Annual Report)). Since the Notice of Appeal was filed on August 9, 2013, and the distribution of the settlement fund is scheduled for January 2014 without accounting for Vincent's appeal, applying the average delay period would extend the time to distribution approximately 10.3 months. Multiplying the average expense of $1,485.00 per month by 10.3 months and adding the claims administrator's estimated one-time fixed fee of $1,215.00 results in expected additional administration costs of $16,510.50. Vincent presents no evidence to rebut this. Accordingly, the Court finds that the requested amount of $17,410.50 is reasonable.

Conclusion

For all of the foregoing reasons, the Court grants Lead Plaintiff's Motion to Impose an Appeal Bond. Vincent is ordered to either (1) post a bond in the amount of $17,410.50 within ten days of this order or (2) file a notice of dismissal of his appeal.

IT IS SO ORDERED.