

1 Darrell Palmer (SBN 125147)
2 Email: darrell.palmer@palmerlegalteam.com
3 Law Offices of Darrell Palmer PC
4 603 North Highway 101, Ste. A
5 Solana Beach, California 92075
6 Telephone: (858) 792-5600
7 Facsimile: (866) 583-8115

8 Attorney for Objectors David Johnson and Maria Carapia

9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 SALVATORE GALLUCCI, AMY ARONICA,
12 KIM JONES, DORIS PETTY, and JEANNE
13 PRINZIVALLI, on behalf of themselves and all
14 others similarly situated, and the general public,

15 Plaintiffs,

16 v.

17 BOIRON, INC., and BOIRON USA, INC.,

18 Defendants

) Case No. 3:11-CV-02039-JAH-NLS

) DAVID JOHNSON AND MARIA CARAPIA'S
) OPPOSITION TO JOINT MOTION TO SET A
) BOND AMOUNT

) Date: January 28, 2013

) Time: 2:30 p.m.

) Judge: Honorable John A. Houston

) Courtroom: 13B

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21 Objectors David Johnson and Maria Carapia (the "Appellants") submit the following opposition
22 to the Joint Motion to Set a Bond Amount as follows:

23 **I. INTRODUCTION**

24 Appellants are consumers who were misled by Defendants Boiron, Inc. and Boiron USA, Inc.'s
25 (the "Defendants") false advertising regarding their homeopathic products. Appellants raised legitimate
26 objections to the class action settlement between Plaintiffs and Defendants. Much as the Settling
27 Plaintiffs, Appellants are also the intended beneficiaries of the protections offered by the Consumer
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1 Protection Laws. On October 31, 2001, the Court entered Judgment sustaining the Appellants’
2 objections in part and overruling the objections in part. Appellants appealed the Judgment because they
3 respectfully submit that the court erred in overruling some of Appellants’ objections. Although the court
4 directed the Appellants to post a bond, they respectfully submit that a bond is unnecessary. Appellants
5 will prevail on their appeal and the posting of a bond will cause financial hardship and will destroy
6 Appellants’ ability to pursue their legitimate appeal. An appeal bond may not be used as a means to
7 restrict a class member from disagreeing with the terms of a settlement and exercising their right to
8 appeal, which is what Settling Plaintiffs intend to achieve. Therefore, Appellants request that the court
9 not impose a bond on appeal.
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12 In addition, even if the court is inclined to set a bond, the Settling Plaintiffs and Defendants have
13 not provided the court with sufficient evidence to set a bond amount. The bond amount requested by the
14 Settling Plaintiffs and Defendants is not supported by evidence, is outrageously high, and therefore,
15 cannot be used as the basis of setting a bond. Settling Plaintiffs have included many items that are not
16 recoverable as costs on appeal and have inflated their estimates to financially pressure the Appellants.
17 For instance, a significant portion of the requested bond of \$235,500.66 is an exorbitant attorney’s fee
18 estimate of \$203,650 to oppose the appeal. However, here Settling Plaintiffs and Defendants have no
19 statutory right to recover attorneys’ fees as appeal costs and therefore, attorneys’ fees cannot be included
20 in determining the bond amount. The unrecoverable amount of attorneys’ fee estimate must be outright
21 rejected by this court. A similar scrutiny of the Settling Plaintiffs and Defendants’ other estimated costs
22 reveal that they are supported by evidence. Under the circumstances, Settling Plaintiffs and Defendants
23 have not established the basis of their requested appeal bond amount. Therefore, the court must reject
24 the requested bond amount entirely.
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II. ARGUMENT

A. REQUIRING APPELLANTS TO POST A BOND WILL UNFAIRLY PENALIZE THEM.

Courts take into consideration different factors while deciding whether to impose a bond and the amount of the bond. When deciding whether to require an appellant to post an appeal bond, district courts consider several factors including: “(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.” *Baker v. Urban Outfitters, Inc.*, No. 01 Civ. 5440(LAP), 2006 WL 3635392, (S.D.N.Y. Dec.12, 2006). Settling Plaintiffs and Defendants argue that the evidence in support of these factors weigh in their favor. However, contrary to Settling Plaintiffs and Defendants’ arguments, the evidence available suggests that these factors weigh in Appellants’ favor. The court must not permit the Settling Plaintiffs and Defendants to use the guise of a Rule 7 bond to suppress Appellants from exercising their right to appeal. It has been held that imposing high “Rule 7 bonds on appeal on where the appeals *might* be found frivolous risks impermissibly encumbering appellants’ right to an appeal....” *Azizian v. Federated Dept. Stores, Inc.* 499 F. 3d 950, 961 (9th Cir., 2007).

In their motion, Settling Plaintiffs and Defendants have not provided any evidence that the Appellants have the financial ability to post as high a bond as the \$203,650 requested by them. Settling Plaintiffs and Defendants argue that some of the other objectors who are represented by the Newport Trial Group have the financial ability to post a bond. The Settling Plaintiffs and Defendants do not advance any argument or state how they believe that the Appellants here have the financial ability to post the requested bond amount. In fact, the Appellants do not have extensive financial resources at their disposal. Appellants are merely consumers like the Settling Plaintiff, who were misled by Defendants’ false advertising. If they are required to post a bond on appeal, then the Appellants will be

1 financially burdened. (Declaration of Maria Carapia) The Appellants are exercising their right to appeal
2 because they respectfully believe that the court erred in the Judgment. The Appellants’ objections raise
3 important questions about class notice, certification, and the fairness of the settlement. Under the
4 circumstances, given the Appellants’ financial constraints, the court must not require the Appellants to
5 post a bond.
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7 Similarly, Settling Plaintiffs and Defendants have not provided any evidence against the
8 Appellants to support their argument that it will be difficult to collect a potential appeal cost award
9 against the Appellants. Settling Plaintiffs and Defendants state that it is likely to be difficult to collect
10 an award from a person who is not a California resident. However, both the Appellants here are
11 California residents. (See Maria Carapia Declaration) Therefore, the only “risk” of collection, as put
12 forth by the Settling Plaintiffs and Defendants, *if* an award is entered in their favor is redundant here.
13 Again, the court must weigh this factor in Appellants’ favor. Appellants have acted in good faith
14 throughout this action and they should not be penalized for exercising their right to appeal. The Settling
15 Plaintiffs and Defendants are attempting to use the tactics of an unreasonably high bond amount to
16 pressure Appellants into withdrawing their appeal. The court must not permit one class action member
17 to prevent another class action member from exercising their legally available right to disagree over the
18 terms of a settlement. Therefore, Appellants request that the court not impose a bond on appeal. If the
19 court is inclined to require Appellants to post a bond, it must exercise judicial discretion in setting a
20 reasonable bond amount. As discussed below, the amount of \$203,650 requested by the Settling
21 Plaintiffs and Defendants is unreasonably high and based on the statutorily recoverable costs on appeal.
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25 **B. SETTling PLAINTIFFS AND DEFENDANTS HAVE NOT PROVIDED THE COURT**
26 **WITH SUFFICIENT EVIDENCE OR ANY BASIS TO SET THE BOND AMOUNT**

27 The Settling Plaintiffs and Defendants claimed bond amount is not supported by the evidence
28 and includes many items of costs that are not recoverable. Under Federal Rules of Appellate Procedure,

1 Rule 7, an appeal bond is limited to the costs taxable under Federal Rules of Appellate Procedure, Rule
2 39, as well as attorney's fees to the extent an underlying statute deems such fees as costs. See *Cobell v.*
3 *Salazar* 816 F. Supp 2d 10, 15; *Azizian v. Federated Dept. Stores, Inc.* 499 F. 3d 950, 958 (9th Cir.,
4 2007). Under Rule 39(e), "the following costs on appeal are taxable in the district court for the benefit
5 of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the
6 reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or
7 other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal." Here, the
8 Settling Plaintiffs and Defendants seek a bond of \$235,500.66, which includes the following: (i) copying
9 cost of \$3,360; (ii) \$12,000 in administrative costs; (iii) \$203,650 in attorney's fees; and (iv) post-
10 judgment interest of \$16,190.66. These costs are either not recoverable, not supported by the evidence,
11 or are unreasonably high.
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14 A significant portion of the Settling Plaintiffs and Defendants' requested bond amount is an
15 attorneys' fee estimate of \$203,650. However, as discussed below, Settling Plaintiffs and Defendants
16 are not entitled to recover attorneys' fees as costs on appeal. Deducting the unrecoverable attorneys'
17 fees, leaves a requested bond amount of \$31,850.66. This amount consists of various items that are not
18 supported by the evidence and is unreasonably high. For instance, the estimate for administrative
19 charges is not support by any admissible evidence. Settling Plaintiffs and Defendants have provided a
20 declaration of Alan Vasquez which does not identify the basis for the estimated administrative costs.
21 This declaration contains a conclusory statement that these administrative costs will be incurred in
22 "maintenance and operation of the call center and handling of communications with Class Members"
23 (Vasquez Decl., ¶2). There is no evidentiary basis for the estimated administrative costs. For instance,
24 what is the volume of expected calls, what is the nature of and cost of "communications with Class
25 Members," or what does the maintenance and operation of the call center entail or cost. Under the
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1 circumstances, there is no evidentiary basis to include “administrative costs” in determining the amount
2 of the bond. The Settling Plaintiffs and Defendants estimates in the other categories such as copying
3 charges are also similarly deficient. Under the circumstances, Appellants submit that the Settling
4 Plaintiffs and Defendants have not established their entitlement to a bond and have not provided the
5 court with sufficient evidence for the court to set a bond amount. Therefore, the court must deny the
6 motion to set a bond amount in its entirety.
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8 **1. ATTORNEYS’ FEES ARE NOT RECOVERABLE AND MUST NOT BE INCLUDED IN**
9 **DETERMINING THE BOND AMOUNT**

10 The Settling Plaintiffs and Defendants’ prospective attorneys’ fees on appeal cannot be included
11 in determining the amount of bond. Courts have held that security for appellate attorneys’ fees is proper
12 only where an underlying statute authorizes the recovery of attorneys’ fees as costs. *Azizian v.*
13 *Federated Dept. Stores, Inc.* 499 F. 3d 950, 961 (9th Cir., 2007). For instance, in *Cobell v. Salazar* 816
14 F.Supp.2d 10 (District of Columbia, 2011), the court found that the provision of the Equal Access to
15 Justice Act, 28 U.S.C. 2412(a)(1) only permits the recovery of attorneys’ fees in addition to the recovery
16 of costs and not as part of recoverable costs. The court observed that “attorneys’ fees pursuant to the
17 provisions of the Equal Access to Justice Act cited by the plaintiffs are not available under Fed. R.App.
18 P. 39 or Fed. R.App. P. 7” because 28 U.S.C. § 2412(a)(1) provides that “unless expressly prohibited by
19 statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may
20 be awarded pursuant to subsection (a), to the prevailing party....By separately addressing costs vis-à-vis
21 attorneys’ fees, the statute could not be clearer that attorneys’ fees are not considered to be the same
22 thing as costs....” Also, in *Pedraza v. United Guaranty Corporation* 313 F.3d 1323 (11th Cir., 2002),
23 the court held that the attorney fee provision of RESPA, 12 U.S.C. § 2607(d)(5), distinguishes between
24 recoverable costs and attorney’s fees. This fee provision states that, “the court may award to the
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1 prevailing party the court costs of the action *together with* reasonable attorneys fees.” Therefore, the
2 court reversed an order that included attorneys’ fees in an appeal bond.

3 Here, the provision of *Civil Code* section 1780 clearly distinguishes between recoverable costs
4 and attorneys’ fees. *Civil Code* section 1780 provides in relevant part that, “The court shall award court
5 costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section.” The rationale
6 in cases such as *Cobell v. Salazar* and *Pedraza v. United Guaranty Corporation* squarely applies here.
7 Because *Civil Code* section 1780 separately identifies court costs and attorneys’ fees, attorneys’ fees
8 cannot be included in setting the bond amount. Therefore, Settling Plaintiffs and Defendants’ attorney’s
9 fees to be incurred on appeal should not be included in the bond amount.

10 Additionally, the provision of attorneys’ fee provisions such as *Civil Code* section 1780 is to
11 protect consumers and not to penalize them. As observed in *Azizian v. Federated Dept. Stores, Inc.* 499
12 F. 3d 950, “While the interests of an antitrust settlement class member who challenges the settlement on
13 appeal may well be adverse to the interests of a class member who supports it, both remain the alleged
14 victims, rather than perpetrators, of the claimed antitrust injury. Ordering one class member to pay other
15 class members' appellate attorney's fees because of a disagreement about the propriety of settlement
16 would not serve the purpose of Section 4 to penalize and deter those who have violated the antitrust
17 laws.” *Ibid* at 960. Similarly, here the purpose of the Consumer Protection Act is to protect the interest
18 of consumers such as Appellants. Therefore, ordering consumers such as the Appellants to pay other
19 class members or Defendants’ appellate attorneys’ fees is inconsistent with the purpose of the statute.
20 Therefore, the Settling Plaintiffs and Defendants are not permitted to recover attorneys’ fees from the
21 Appellants.

22 In addition, it is not mandatory to include attorneys’ fees on appeal as part of the bond amount,
23 especially where it is not certain that attorneys’ fees can be recovered against the appellant. “A district
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1 court need not order that appellate attorney's fees be secured in a Rule 7 bond merely because an
2 applicable fee-shifting provision includes them as part of its definition of costs. Requiring security for
3 anticipated appellate attorney's fees under Rule 7 may be improper, notwithstanding an applicable fee-
4 shifting provision, where other factors, such as financial hardship, indicate that the bond would unduly
5 burden a party's right to appeal.” Here, as discussed above, Appellants will suffer financial hardship
6 from having to post a \$200,000 plus appeal bond. Therefore, the court must deny Settling Plaintiffs and
7 Defendants’ request to include attorneys’ fees in the determination of the amount of the appeal bond.

8
9 **III. CONCLUSION**

10 As discussed above, the Settling Plaintiffs and Defendants have not established their entitlement
11 or the evidentiary basis for the imposition of a bond on appeal. Even if Settling Plaintiffs and
12 Defendants believe that the Appellants’ appeal is frivolous, they cannot be permitted to use financial
13 pressure under F.R.A.P, Rule 7 to prevent Appellants from exercising their right to appeal. “The
14 traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to
15 dismiss....Additionally, a monetary remedy is afforded by Federal Appellate Rule 38, which authorizes
16 an assessment of damages and single or double costs, including reasonable attorneys' fees, if the court of
17 appeals shall determine that the appeal is frivolous. It is, however, for the court of appeals, not the
18 district court, to decide whether Rule 38 costs and damages should be allowed in any given case.”
19 (internal quotations omitted) *In re American President Lines, Inc.* 779 F. 2d 714, 717 (District of
20 Columbia, 1985). Under the circumstances, the court must deny Settling Plaintiffs and Defendants’
21 motion in its entirety.

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25 Dated: January 14, 2013

LAW OFFICES OF DARRELL PALMER PC

26 By: /s/ Joseph Darrell Palmer
27 Joseph Darrell Palmer
28 Attorney for Objectors

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States District Court for the Southern District of California by using the USDC CM/ECF system.

Service on participants in the case who are registered CM/ECF users will be accomplished by the USDC CM/ECF system, to wit:

Israel Elizondo
1738 Arlington
Corpus Christi, TX 78415

By /s/ Joseph Darrell Palmer
Joseph Darrell Palmer

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Email: darrell.palmer@palmerlegalteam.com
2 Law Offices of Darrell Palmer
603 North Highway 101, Ste A
3 Solana Beach, California 92075
Telephone: (858) 792-5600
4 Facsimile: (858) 792-5655

5 Attorney for Objectors David Johnson and Maria Carapia
6

7
8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 SALVATORE GALLUCCI, AMY ARONICA,
11 KIM JONES, DORIS PETTY, and JEANNE
12 PRINZIVALLI, on behalf of themselves and all
others similarly situated, and the general public,

13 Plaintiffs,

14 v.

15 BOIRON, INC., and BOIRON USA, INC.,

16 Defendants
17
18

Case No. 3:11-CV-02039-JAH-NLS

DECLARATION OF DAVID JOHNSON IN
SUPPORT OF OPPOSITION TO JOINT
MOTION TO SET A BOND AMOUNT

Date: January 28, 2013
Time: 2:30 p.m.
Judge: Honorable John A. Houston
Courtroom: 13B

19
20 I, David Johnson declare as follows:

21 1. I reside in the State of California, County of San Diego. If called upon to testify as to the
22 matters set forth, I could and would testify competently thereto:
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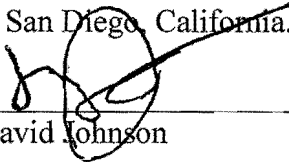
24 2. Should a bond be required to be posted, it will be a great financial burden and hardship
25 upon me.

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3. I do not own any real estate or have other assets besides very modest savings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 14th day of January 2013 at San Diego, California.



David Johnson

1 Darrell Palmer (SBN 125147)
Email: darrell.palmer@palmerlegalteam.com
2 Law Offices of Darrell Palmer
603 North Highway 101, Ste A
3 Solana Beach, California 92075
Telephone: (858) 792-5600
4 Facsimile: (858) 792-5655

5 Attorney for Objectors David Johnson and Maria Carapia
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8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 SALVATORE GALLUCCI, AMY ARONICA,
11 KIM JONES, DORIS PETTY, and JEANNE
12 PRINZIVALLI, on behalf of themselves and all
others similarly situated, and the general public,

13 Plaintiffs,

14 v.

15 BOIRON, INC., and BOIRON USA, INC.,

16 Defendants
17
18

) Case No. 3:11-CV-02039-JAH-NLS

) DECLARATION OF MARIA CARAPIA IN
) SUPPORT OF OPPOSITION TO JOINT
) MOTION TO SET A BOND AMOUNT

) Date: January 28, 2013

) Time: 2:30 p.m.

) Judge: Honorable John A. Houston

) Courtroom: 13B

19
20 I, Maria Carapia declare as follows:

21 1. I reside in the State of California, County of San Diego. If called upon to testify as to the
22 matters set forth, I could and would testify competently thereto:
23

24 2. I am the sole bread winner for me and my significant other. My annual income allows
25 for only what is needed to pay for food, shelter and necessary daily living expenses. Should a bond be
26 required to be posted, such posting will be a great financial burden and hardship upon me.
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