


1 Israel Elizondo
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2013 JAN 14 PM 12:12
SOUTHERN DISTRICT OF CALIFORNIA
BY 

6 **UNITED STATES DISTRICT COURT**
7 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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

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

12 Plaintiffs,)

RESPONSE IN OPPOSITION
TO JOINT MOTION TO SET
BOND

13 v.)

14 BOIRON, INC. AND BOIRON USA, INC.,)
15 Defendants.)

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

16 COME NOW, Objector Israel Elizondo ("Elizondo"), and files this Response in Opposition
17 to the Joint Motion To Set Bond Amount.

18 INTRODUCTION

19 Plaintiffs filed a Joint Motion To Set Bond Amount. The motion seeks the imposition of a
20 bond of in excess of \$235,000, which largely consists of attorneys' fees not yet incurred. Plaintiffs
21 cite *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007), which directly denies the
22 ability to obtain such a bond for attorneys' fees against an objector under Rule 7 FRAP (costs) or
23 Rule 38 FRAP (frivolous appeal). Plaintiffs do not even argue that the appeals are frivolous; rather
24 they argue merely that they believe it is more likely Plaintiffs will ultimately prevail on appeal. The
25 Motion To Set Bond should be denied in its entirety.
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RESPONSE

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2 Class Plaintiffs sought a class definition that incorporated Israel Elizondo into the class.
3 Class Plaintiffs based their application for incentive awards and their attorneys' fees on the supposed
4 "benefits" conferred upon the class which included Israel Elizondo. After shaping the class to
5 include Israel Elizondo they cannot now be heard to complain of objectors inclusion in the action, or
6 any hardship their inclusion might cause.

7
8 Class Counsel's Motion Is Inappropriate

9 Class Plaintiffs may obtain a bond for anticipated costs under Rule 7 FRAP, but those costs
10 are limited to those set forth in Rule 39 FRAP. The bond sought is not conservative and is not for
11 costs, but rather to deter appeals. Under Rule 7 FRAP, even if objectors' appeal is unsuccessful,
12 Plaintiffs would not be allowed to recover "attorneys' fees," "incidental costs" or "administrative
13 costs."

14 It is clear that Class Counsel is seeking a total bond of in excess of \$235,000 in an attempt to
15 stifle objectors' appeal from this Court's approval of the settlement and their attorneys' fees. That is
16 not a proper use of the rules relating to bonding, and the Court should not allow it pursuant to Rule 7
17 FRAP.

18
19 The Appeal Is Not Frivolous

20 First, the appeal is not frivolous. Plaintiffs do not even argue the appeal is frivolous, because
21 it clearly is not. An appeal is frivolous if "the result is obvious or if the claims of error are wholly
22 without merit." *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983).

23
24 The fact that there is a body of federal jurisprudence regarding attorney's fees shows
25 reasonable people often differ on this issue. 28 U.S.C. Section 1927 which might support a bond for
26 "vexatious litigation conduct," is inapplicable to this appeal as it requires "bad faith or intentional
27 misconduct by counsel." Although the imposition of attorney's fees on appeal as a sanction is
28 allowed under rule 38 FRAP, it is only available after the appeals court finds the appeal frivolous,

1 and only upon further motion and hearing. See *Azizian v. Federated Department Stores, Inc.*, 499
2 F.3d 950, 960 (9th Cir. 2007).

3 It is well established that whether an appeal is frivolous is solely within the purview of the
4 appellate court, not the district court. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295,
5 299 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 407 (1990); *In re American*
6 *President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985). Only the appellate court has the authority
7 to impose sanctions for a frivolous appeal. *Azizian*, 499 F.3d at 960; *In re Vasseli*, 5 F.3d 351, 353
8 (9th Cir. 1993) citing *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985).

10 D. Bondable Costs Do Not Include Additional Administrative Expenses, Post-Judgment
11 Interest or Attorney's Fees

12 Plaintiffs suggest that this Court has the authority to include administrative expenses, post-
13 judgment interest and/or attorneys' fees as items of Rule 7 FRAP costs. It does not. See *Azizian*, 499
14 F.3d at 958.

15 The bond that Class Plaintiffs seek is simply not permitted by Rule 7 FRAP where a court's
16 discretion is limited to costs available under rule 39 FRAP. Class Plaintiffs have made no showing
17 that these appellate costs supposedly caused by the Objectors/Appellants will be anywhere near
18 \$235,000 that is sought. Costs recoverable under Rule 39 FRAP for an appellee and thus allowed to
19 be included in a Rule 7 FRAP appeal bond are the 'necessary copies of a brief or appendix,'
20 "preparation and transmission of the record," and "the reporter's transcript." The only costs that are
21 arguably bondable are the \$610 "per individual set of papers," for a total of \$3,660 "for all six."
22 Objector Elizondo's proportionate share of two sets of papers would be \$1,220. But the evidence
23 even supporting that amount is not sufficient to support the award of a bond in this case.

24 Appeals should be decided by appellate courts; and to the extent that an appellate court finds
25 an appeal is "frivolous," the remedy is a motion in the appellate court under Rule 38 FRAP and/or a
26 Rule 27 FRAP motion to summarily dismiss an appeal, not a district court order issuing a punitive
27 appeal bond.
28

1 Plaintiffs' only basis for the bond amount is other reported district court opinions that are
2 based on facts specific to those appeals. The proposed amount is excessive under Rule 7 FRAP.

3 E. Other Responses

4 Israel Elizondo hereby adopts and incorporates herein the responses or oppositions to the
5 Joint Motion To Set Bond Amount filed by other objectors/appellants herein, including those filed
6 by the Law Office of Darrell Palmer and the Newport Trial Group.¹

7 **CONCLUSION**

8 There is no basis for the posting of a bond. The appeal is based upon good faith and founded
9 on precedent. The Objector, Israel Elizondo, prays that Class Plaintiffs' motion be denied.

10 **RELIEF**

11 Objector Israel Elizondo requests the Court to deny the Joint Motion To Set A Bond.

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14
15 January 11, 2013

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17 Respectfully submitted,

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19 By:



20 Israel Elizondo

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28 ¹ Bandas Law Firm, P.C. has filed a notice of appearance on behalf of Mr. Elizondo in appellate case No. 12-57184 in the 9th Circuit Court of Appeals and assisted in the preparation of this response and objection.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been forwarded to all those listed below via United States Postal Service by CM-RRR on this the 11th day of January 2013.

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Israel Elizondo