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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALVATORE GALLUCCI, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

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

Defendants.

Civil No. 11cv2039 JAH(NLS)

**ORDER GRANTING IN PART
JOINT MOTION TO SET BOND
AMOUNT [DOC. # 138]**

INTRODUCTION

Currently pending before the Court is the joint motion to set bond amount filed by the parties in this settled class action case. Non-party objectors Henry Gonzales, Monica Fernandez, Eleanor Lanigan, Michael Martinez, Glenna O’Dell, Gemis Rangel, David Johnson and Maria Carapia¹ (collectively “the objectors”) have filed oppositions to the joint motion and the parties have filed a reply brief. After careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS IN PART the joint motion to set a bond amount and sets the appeal bond at \$5,000.00.

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¹ On June 3, 2013, the Ninth Circuit dismissed the appellate proceedings filed by *pro se* class member Israel Elizondo. See Doc. # 146. Thus, this Court does not address the arguments presented by Elizondo in his opposition to the instant motion.

1 BACKGROUND

2 Plaintiff Salvatore Gallucci originally filed a complaint on September 2, 2011
3 against Boiron, Inc. and Boiron USA, Inc. (collectively “Boiron” or “defendants”). On
4 February 6, 2012, Mr. Gallucci, Amy Aronica, Kim Jones, Doris Petty, and Jeanne
5 Prinzivalli (collectively “plaintiffs” or “named plaintiffs”) filed a First Amended Complaint
6 (the “FAC”) alleging violations of California’s Unfair Competition Law, Bus. & Prof. Code
7 §§ 17200, et seq., False Advertising Law, *id.* §§ 17500, et seq., and Consumer Legal
8 Remedies Act, Cal. Civ. Code §§ 1750, et seq.

9 Boiron manufactures and distributes in the United States over 200 homeopathic
10 products at issue in this case. Plaintiffs allege that Boiron’s labeling and advertising of its
11 homeopathic products are false and misleading. On April 25, 2012, the Court entered an
12 order preliminarily approving the class settlement and scheduled a fairness hearing to
13 determine whether the settlement is fair, reasonable, adequate, in the best interests of the
14 Class and free from collusion. After conducting the fairness hearing at which objectors
15 presented their respective positions, this Court overruled all but one of the objections and
16 entered judgment based on the settlement. The judgment included an appeal bond
17 requirement. *See* Doc. # 125 at 10.

18 There are currently two groups of objectors who have appellate proceedings
19 pending: (1) class members Henry Gonzales, Monica Fernandez, Eleanor Lanigan, Michael
20 Martinez, Glenna O’Dell and Gemis Rangel, represented by the Newport Trial Group
21 (“the NTG objectors”); and (2) class members Maria Carapia and David Johnson,
22 represented by Darrell Palmer. The instant joint motion to set the appeal bond amount
23 was filed on December 20, 2012. The objectors filed oppositions to the motion and the
24 parties filed a reply thereto. This Court subsequently took the motion under submission
25 without oral argument. The Ninth Circuit, on May 7, 2013, stayed the appellate
26 proceedings filed by Henry Gonzales until July 23, 2013, or until the bond amount issue
27 before this Court is resolved. *See* Doc. # 145.

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1 DISCUSSION

2 1. **Legal Standard**

3 “[T]he district court may require an appellant to file a bond or provide other
4 security in any form and amount necessary to ensure payment of costs on appeal.” Azizian
5 v. Federated Dep’t Stores, Inc., 499 F.3d 950, 954–55 (9th Cir.2007) (citing Fed. R.App.
6 P. 7). “[T]he purpose of [an appeal bond] is to protect an appellee against the risk of
7 nonpayment by an unsuccessful appellant.” Fleury v. Richemont N. Am., Inc., 2008 WL
8 4680033, at *6 (N.D.Cal. Oct. 21, 2008) (quotations and citations omitted). “[T]he
9 question of the need for a bond, as well as its amount, are left [to] the discretion of the
10 trial court.” Id. In determining whether a bond should be required, courts have
11 considered: (1) the appellant’s financial ability to post a bond; (2) the risk that the
12 appellant would not pay the appellee’s costs if the appeal loses; and (3) the merits of the
13 appeal. See id. at *6–7. While an appeal bond should be sufficient to cover costs on
14 appeal, those costs may only include attorney fees if the claim is brought under a
15 fee-shifting statute that would allow recovery from an objecting class member. Azizian,
16 499 F.3d at 958. A finding that an appeal is frivolous cannot serve as a basis for including
17 attorney’s fees in the appeal bond amount. Id. at 960. In addition, requiring security for
18 attorney’s fees under Rule 7 is not mandatory. Id. at 961.

19 2. **Analysis**

20 The parties in this action jointly seek to have this Court set the appeal bond in the
21 amount of \$235,500.66, consisting of (1) \$3,660.00 in printing, filing and service costs;
22 (2) \$12,000.00 in administrative costs; (3) \$203,650.00 in attorney’s fees; and (4)
23 \$16,190.66 in post-judgment interest. See Doc. # 138 at 2-9. Objectors Carapia and
24 Johnson dispute the propriety of ordering an appeal bond in this case and both groups of
25 objectors dispute the amount sought. See Docs. # 140, 141.

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1 **a. Propriety of Ordering Appeal Bond**

2 After a careful review of the record, this Court finds the posting of an appeal bond
3 is warranted here. In regards to the first factor, the ability to post a bond, this Court notes
4 the Carapia and Johnson objectors present no evidence, other than conclusory argument,²
5 to support a finding that they are unable to post a bond. *See* Doc. # 141 at 3. Thus, this
6 factor weighs in favor of imposing an appeal bond. As to the difficulty of collecting
7 payment post-appeal, this factor is inapplicable here because all of the objectors are
8 residents of California. *Fleury*, 2008 WL 4680033 at *7. The last factor, however, weighs
9 heavily in favor of imposing a bond because, as the parties point out, this “Court has
10 already carefully considered each of the[] objections and ruled on them prior to approving
11 the settlement ... [the objectors] are highly unlikely to prevail on appeal.” Doc. # 142 at
12 1 (citing *Yingling v. eBay, Inc.*, 2011 WL 2790181 at *2 (N.D. Cal. July 5,
13 2011)) (“Because the Court has already considered [appellant’s] objections and found them
14 to be meritless, this Court finds that [objector-appellant] is unlikely to succeed on the
15 merits of his appeal.”)). This Court agrees that, here, because this Court has already
16 considered and overruled the objections, it is unlikely the objectors will prevail on appeal.
17 Accordingly, this Court deems it appropriate to require the posting of an appeal bond.

18 **b. Amount of Appeal Bond**

19 This Court finds that the amount of the appeal bond, \$235,500.66, sought by the
20 parties is unwarranted. This Court finds that it may only award one of the four items
21 requested, namely, appellate costs. *See Miletak v. Allstate Ins. Co.*, 2012 WL 3686785
22 at 2 (N.D. Cal. Aug. 27, 2012). Contrary to the parties’ contention, attorneys fees may
23 only be included in an appeal bond calculation if the claim is brought under a fee-shifting
24 statute allowing recovery from an objecting class member. *See id.* (citing *In re MagSafe*

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26 ² The only argument presented by objectors Carapia and Johnson is that they are simply consumers,
27 just like the settling plaintiff, who were misled by defendants’ false advertising and, as such, lack the extensive
28 financial resources needed to post a high bond on appeal. Doc. # 141 at 3. Thus, insofar as these objectors
have “submitted no financial information to indicate [they are] financially unable to post a bond,” this factor
weighs in favor of imposing a bond. *Fleury*, 2008 WL 4680033 at 7; *see also Miletak v. Allstate Ins. Co.*,
2012 WL 3686785 at 2 n. 4 (N.D. Cal. Aug. 27, 2012)(citing *Fleury*, 2008 WL 4680033 at 7)).

1 Apple Power Adapter Litig., 2012 WL 2339721 at *1 (N.D. Cal. 2012)). As in Miletak,
2 the parties here cite no case holding that the underlying statute in this lawsuit allows
3 recovery from an objecting class member and this Court is not aware of any such case. *See*
4 *id.* As to post-judgment interest and administrative costs, which this Court deems to be
5 delay costs, this Court finds that such anticipated damages are not required and, thus,
6 declines to impose them here. *See Embry v. ACER Am. Corp.*, 2012 WL 2055030 at *2
7 (N.D. Cal. June 5, 2012); Shulken v. Washington Mutual Bank, 2013 WL 1345716 at
8 *7 (N.D. Cal. April 2, 2013).

9 The NTG objectors suggest an appropriate bond amount of \$5,000.00. *See* Doc.
10 # 140 at 9. This Court's review of the case authority in this area reveals that courts
11 routinely deem a low bond amount sufficient in cases such as this one. *See, e.g., Azizian*,
12 499 F.3d at 962 (requiring a \$2,000 bond); Fleury, 2008 WL 4680033 at *10 (\$5,000
13 bond); Yingling, 2011 WL 2790181 at *2 (\$5,000 bond). For the reasons set forth
14 above, this Court agrees with the NTG objectors' assessment and sets the appeal bond
15 amount at \$5,000.00 to be posted collectively by all objector-appellants.

16 **CONCLUSION AND ORDER**

17 Based on the foregoing, IT IS HEREBY ORDERED that:

- 18 1. The parties' motion for an appeal bond [doc. # 138] is **GRANTED IN**
19 **PART**; and
20 2. Appealing objectors are required to collectively post an appeal bond in the
21 amount of \$5,000.00 **no later than July 19, 2013** or file a notice of
22 dismissal of their respective appeals.

23 DATED: June 6, 2013

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25 JOHN A. HOUSTON
26 United States District Judge
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