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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 CHRISTOPHER JAMES, et al.,

8 Plaintiffs,

9 v.

10 UBER TECHNOLOGIES INC.,

11 Defendant.

Case No. [19-cv-06462-EMC](#)

**ORDER GRANTING PLAINTIFFS’
REQUEST FOR AN APPEAL BOND**

Docket No. 233

12
13 **I. INTRODUCTION**

14 Plaintiffs ask the Court to impose an appeal bond should S. Patrick Mendel, a settlement
15 class member who is proceeding *pro se*, wish to pursue his objections on appeal. *See* Docket No.
16 207 (Plaintiffs’ Motion for Final Approval of Class Settlement, or “Mot.”) at 20 & 20 n.13;
17 Docket No. 239 (“Plaintiffs’ Response to Mendel’s Response to Order to Show Cause, or “Pl.
18 Resp.”). The detailed factual and legal background of the case is set forth in the Court’s January
19 26, 2021 Order. *See* Docket No. 143. This background information is recounted below to the
20 extent relevant to Mr. Mendel’s objections and the present motion. For the reasons provided
21 below, the Court **GRANTS IN PART** Plaintiffs’ request for an appeal bond and requires Mr.
22 Mendel to post a \$1,000 appeal bond.

23 **II. BACKGROUND**

24 The underlying class action arose out of allegations that certain Uber and Uber Eats drivers
25 were misclassified as independent contractors under California law. Plaintiffs brought various
26 wage and sick leave claims under the California Labor Code. *See generally* Docket No. 81
27 (Amended Complaint). Mr. Mendel, as a former driver for Uber, is a member of the class.
28 Docket No. 221 (July 8, 2022 Order) at 2. At no point did Mr. Mendel seek to intervene in the

1 case.

2 On April 5, 2022, after two and a half years of litigation, the Court granted Plaintiffs’
3 motion for preliminary approval of the class action settlement. Docket No. 195. The Court set the
4 fairness hearing for July 14, 2022. *Id.*

5 On May 27, 2022, Mr. Mendel filed an emergency temporary restraining order and sought
6 a stay “to prevent the imminent murder, rape and assault of Uber drivers and passengers and an
7 unjust settlement of valid claims against Uber.” Docket No. 204 (Motion for Temporary
8 Restraining Order, or “TRO Mot.”) at 2. In his motion, Mr. Mendel argued that the Court should
9 abstain from the case on the basis of *Younger* abstention doctrine “because the Attorney General
10 of California is currently engaged in litigation in State Court over the very same labor and expense
11 violations that are the subject of this dispute.” *Id.* at 7. Mr. Mendel also devoted several pages to
12 his argument that Uber operated in violation of the Federal Motor Carrier Act and related
13 regulations. *Id.* at 10–25. As Mr. Mendel acknowledged in his briefing, this particular argument
14 was not new: in a related case three years earlier, the Court rejected the same argument from Mr.
15 Mendel because the alleged violations of federal and state law were “outside the scope” of the
16 settlement agreement. *Id.* at 12 (quoting *O’Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC,
17 2019 WL 4394401, at *5 (N.D. Cal. Sept. 13, 2019), *aff’d*, No. 19-17073, 2019 WL 7602362 (9th
18 Cir. Dec. 20, 2019)).

19 On May 31, 2022, the Court denied Mr. Mendel’s motion for a temporary restraining order
20 due to insufficient information regarding Mr. Mendel’s standing to intervene in the action. Docket
21 No. 206. The Court further observed that Mr. Mendel had not shown either a likelihood of
22 success or a serious question going to the merits of his claims that would warrant the relief that he
23 sought. *Id.*

24 On June 9, 2022, when Plaintiffs moved for final approval of the class settlement, they
25 asked the Court to impose an appeal bond on Mr. Mendel based on his “gross misuse of the
26 judicial system.” Mot. at 20 & 20 n.4. Plaintiffs noted that “most if not all of the issues raised by
27 Mendel in his Objection have already been decided against him in other cases (all of them
28 involving Mr. Mendel himself), and as such, he should be precluded from continuing to endlessly

1 relitigate these questions.” *Id.* at 21 (citing *O’Connor v. Uber Techs., Inc.*, 2019 WL 4394401,
2 *Overton v. Uber Techs., Inc.*, 333 F. Supp. 3d 927, 934 (N.D. Cal. 2018), *aff’d*, 805 F. App’x 485
3 (9th Cir. 2020); *Mendel v. Chao, et al.*, Case No. 19-cv-3244 (N.D. Cal.)). In addition to Mr.
4 Mendel’s various cases against Uber, Plaintiffs alleged that Mr. Mendel had litigated a “wholly
5 frivolous suit” against Class Counsel for malpractice. *Id.* at 20 n.13. Based on Mr. Mendel’s
6 previous cases against Uber and Class Counsel, Plaintiffs expressed their concern that Mr. Mendel
7 would “attempt to hold the class hostage over his own personal grievances.” *Id.*

8 On July 5, 2022, Mr. Mendel moved to dismiss the case on the basis of the *Younger*
9 abstention doctrine. *See* Docket No. 216 at 8–13. Mr. Mendel also alleged that Uber was
10 operating in violation of federal and state law. *Id.* at 2–4. The Court exercised its discretion to
11 construe Mr. Mendel’s motion to dismiss as objections to the class settlement so that it could
12 consider the merits of his arguments during the upcoming fairness hearing. Docket No. 221 at 2.
13 On July 12, 2022, Plaintiffs responded to Mr. Mendel’s objections and explained why the *Younger*
14 abstention doctrine did not apply. *See* Docket No. 223 at 2. In particular, Plaintiffs pointed out
15 that the present case could not have “the practical effect of enjoining the state court proceedings”
16 because the instant case only settled the claims for a small percentage of Uber drivers. *Id.*
17 Plaintiffs again asked the Court to “order [Mr. Mendel] to pay a bond if he continue[d] to pursue
18 these frivolous objections on appeal, to the detriment of the Settlement Class.” *Id.* at 5.

19 On July 21, 2022, during the hearing on the motion for final approval of the class
20 settlement, the Court explained that it was overruling Mr. Mendel’s objections because, for the
21 reasons stated on the record, *Younger* abstention did not apply. Docket No. 227. The Court orally
22 indicated during the hearing that it would require Mr. Mendel to show cause why he should not be
23 required to post a bond as a condition of appealing the Order and Final Judgment. *Id.* A few days
24 after the hearing, the Court ordered Mr. Mendel to show cause why the Court should not require
25 an appeal bond, should Mr. Mendel wish to pursue his objections on appeal. *Id.* at 2. The Court
26 specifically ordered Mr. Mendel to address (1) his financial ability to post bond; (2) the risk that
27 he would not pay the costs if the appeal loses; and (3) an assessment of the likelihood that he will
28 lose the appeal and be subject to costs. *Id.*

1 On August 23, 2022, Mr. Mendel filed his response to the order to show cause, *see* Docket
2 No. 235, as well as a “motion to disqualify or recuse for judicial prejudicial bias upon pro se
3 plaintiff.” Docket No. 236. The majority of Mr. Mendel’s response brief is dedicated to his
4 theories that Uber operates in violation of federal transportation laws and that the undersigned has
5 exhibited bias against him. Docket No. 235 (Mendel’s Response to Order to Show Cause, or
6 “OSC Resp.”) at 2–11. Mr. Mendel did not address the risk that he would not be able to pay the
7 costs if the appeal loses, nor did he address the likelihood that he would lose the appeal. *Id.* As
8 for his financial ability to post bond, Mr. Mendel alleged in his brief that he was “broke without
9 funds or assets because he is now approaching 65 years of age and cannot secure viable career
10 employment.” *Id.* at 11. Mr. Mendel also alleged that the Ninth Circuit had granted him in forma
11 pauperis status in September 2021. *Id.*; *see also* Docket No. 237 at 24–25 (asking the Court to
12 take judicial notice of the Ninth Circuit’s order requesting Mendel’s motion to proceed in forma
13 pauperis). Mr. Mendel did not provide any evidence to support his allegation that he currently
14 lacks the financial ability to post an appeal bond.

15 On September 6, 2022, Plaintiffs filed their response to Mr. Mendel’s submission, in which
16 they again urged the Court to impose an appeal bond. *See* Pl. Resp. at 5. The question of whether
17 to impose an appeal bond on Mr. Mendel is thus fully briefed and ripe for adjudication.

18 **III. LEGAL STANDARDS**

19 “In a civil case, the district court may require an appellant to file a bond or provide other
20 security in any form and amount necessary to ensure payment of costs on appeal.” Fed. R. App. P.
21 7. *See Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 954–55 (9th Cir. 2007) (citing Fed.
22 R. App. P. 7). “[T]he purpose of [an appeal bond] is to protect an appellee against the risk of
23 nonpayment by an unsuccessful appellant.” *Fleury v. Richemont N. Am., Inc.*, No. 05-cv-4525
24 EMC, 2008 WL 4680033, at *6 (N. D. Cal. Oct. 21, 2008) (quotations and citations omitted). In
25 determining whether a bond should be required, the court should consider: (1) the appellant’s
26 financial ability to post a bond; (2) the risk that the appellant would not pay the appellee’s costs if
27 the appeal loses; and (3) the merits of the appeal. *See id.* at *6–7. While an appeal bond should be
28 sufficient to cover costs on appeal, those costs may only include attorney fees if the claim is

1 brought under a fee-shifting statute that would allow recovery from an objecting class member, as
2 opposed to a defendant. *Azizian*, 499 F.3d at 953–54. Even if a district court concludes that
3 attorney fees are likely to be awarded on the ground that an appeal is frivolous, the district court
4 may not include such fees in an appeal bond absent a fee shifting statute. *See id.* at 954.

5 IV. DISCUSSION

6 Plaintiffs seek an appeal bond of an amount between \$5,000 and \$10,000. Pl. Resp. at 4.
7 Rule 7 of the Federal Rules of Appellate Procedure provides that the district court may require an
8 appellant to post a bond in order to ensure payment of appellate costs. *See Fed. R. App. P. 7.*
9 Congress intended appeal bonds to “protect against the risk of nonpayment by an unsuccessful
10 appellant.” *Fleury*, 2008 WL 4680033, at *6. The Court first addresses the question of whether
11 an appeal bond is appropriate in this case. Because, as explained below, the Court finds that an
12 appeal bond is warranted, the Court then reaches the question of what costs should be included in
13 the appeal bond.

14 A. Appropriateness of Granting an Appeal Bond

15 The appropriateness of a bond is analyzed in light of (1) the appealing party’s financial
16 ability to post a bond, (2) the risk that the appealing party would not pay costs, if the appeal fails,
17 and the (3) the likelihood that the appealing party will lose their appeal. *Fleury*, 2008 WL
18 4680033, at *6. The Ninth Circuit does not allow courts to consider an individual’s status as a
19 professional objector in determining the appropriateness of an appeal bond. *Id.* (citing *Azizian*,
20 499 F.3d at 960) (explaining that “Rule 7 is not intended to provide a penalty to address the
21 frivolity of an appeal”). Review of these three factors leaves the Court confident that, on the
22 whole, an appeal bond is appropriate in this case.

23 1. Financial Ability to Post Bond

24 “The objector bears the burden of establishing that [he] cannot post an appeal bond.”
25 *Forcellati v. Hyland’s, Inc.*, No. 12-cv-01983, 2018 WL 11374915, at *2 (C.D. Cal. Feb. 5, 2018)
26 (citing *Miletak v. Allstate Ins. Co.*, No. 06-cv-02778-JW, 2012 WL 3686785, at *2 (N.D. Cal. Aug.
27 27, 2012)); *see also Fleury*, 2008 WL 4680033, at *7 (finding that failure to establish an inability
28 to pay a bond typically weighs in favor of awarding the bond).

1 In support of his argument that he cannot afford to post bond, Mr. Mendel alleged that he
 2 is “broke without funds or assets because he is now approaching 65 years of age and cannot secure
 3 viable career employment.” OSC Resp. at 11. Mr. Mendel further pointed to his in forma
 4 pauperis status from last year. *Id.*; *see also* Docket No. 237 (RJN) at 24.

5 Plaintiffs contend that Mr. Mendel “has not made a strong showing regarding his financial
 6 ability to pay.” Pl. Resp. at 3. Plaintiffs note that Mr. Mendel did not include a sworn affidavit
 7 regarding his income and expenses that would permit the court to evaluate his claims of indigence.
 8 *Id.* And while Mr. Mendel did provide a copy of the Ninth Circuit’s order granting him in forma
 9 pauperis status, Plaintiffs observe that this order was based upon financial information submitted
 10 in June 2021. *Id.* In Plaintiffs’ view, “Mendel’s reference to outdated filings from fourteen
 11 months ago fails to meet his burden to show that he is financially unable to pay an appeal bond
 12 today.” *Id.*

13 The Court agrees with Plaintiffs that Mr. Mendel did not provide a strong showing as to his
 14 financial ability to pay an appeal bond. While Mr. Mendel’s in forma pauperis status indicates
 15 that he had limited financial means as of June 2021, the Court was not provided with a declaration
 16 or other evidence that elucidated his financial status as of present day.¹ Without some sort of
 17 evidentiary showing on this front, the Court cannot find that Mr. Mendel has established that he
 18 *currently* lacks the financial ability to post an appeal bond. *See Bickley v. Schneider Nat’l, Inc.*,
 19 No. 08-cv-05806-JSW, 2016 WL 9114937, at *4 (N.D. Cal. Nov. 28, 2016) (“The Court
 20 concludes that both Mr. Ellis and Mr. Pittman have limited financial means, but have the ability to
 21 post a bond in some amount. The Court finds that this factor weighs in favor of requiring a bond,
 22 but in an amount less than that requested by Plaintiffs.”); *cf. Edwards v. Nat’l Milk Producers*
 23 *Fed’n*, No. 11-cv-04766-JSW, 2017 WL 4581926, at *5 (N.D. Cal. Sept. 13, 2017) (“The Court
 24 finds that Andrews has shown that he has limited financial means available for the purpose of
 25 posting an appeal bond. However, the Court considers not only whether Andrews currently
 26

27 _____
 28 ¹ The Court is mindful that that Mr. Mendel is proceeding *pro se*. The Court notes for the record,
 however, that Mr. Mendel did submit a declaration in support of his motion to disqualify the
 undersigned. *See* Docket No. 237 at 2.

1 possess sufficient assets to post a bond, but whether he can qualify for a bond in the amount
2 imposed, and in light of Andrews' profession and income finds that Andrews does have the ability
3 to qualify for and post a bond.”).

4 Because Mr. Mendel could have and should have provided current evidence that revealed
5 his current ability to pay an appeal bond, the Court concludes that this factor weighs only slightly
6 against imposing an appeal bond.

7 2. Risk of Non-Payment

8 The second factor, risk of non-payment, weighs in favor of granting an appeal bond when
9 collecting costs after a failed appeal would be difficult. *See Fleury*, 2008 WL 4680033, at *7. If
10 an objector resides outside of the state or circuit where an appeal was filed, then an appeal bond is
11 likely appropriate. *Id.* at *7 (finding that the risk of non-payment favored granting the bond
12 because the objector did not reside in California or the Ninth Circuit); *cf. Miletak*, 2012 WL
13 4686785, at *2 (finding that this factor was “neutral” because the objector was “a resident of
14 California”). Here, Mr. Mendel lives in California. *See, e.g.*, OSC Resp. at 1 (reflecting that Mr.
15 Mendel has a mailing address in San Leandro).

16 Plaintiffs nonetheless contend that the risk that Mr. Mendel would not pay the costs of
17 appeal is high because “Mr. Mendel has shown a consistent disregard for court rules and
18 procedures.” Pl. Resp. at 3. In support, Plaintiffs note that Mr. Mendel filed a procedurally
19 improper motion to dismiss, a “groundless” motion to disqualify the undersigned, and has
20 continued to “press arguments that have already been rejected by the Ninth Circuit.” *Id.* at 3–4.
21 The Court agrees with Plaintiffs that Mr. Mendel has filed procedurally improper motions. The
22 Court does not, however, find that such conduct necessarily demonstrates that Mr. Mendel will not
23 pay the costs of an appeal, though it raises the specter of non-cooperation.

24 The Court concludes that this factor is neutral.

25 3. Merits of the Appeal

26 The final consideration in determining whether an appeal bond should be awarded is the
27 merits of the appeal in question. *Fleury*, 2008 WL 4680033, at *21. The Court agrees with
28 Plaintiffs that this factor cuts strongly in favor of requiring a bond.

1 During the fairness hearing on July 21, 2022, the Court thoroughly considered Mr.
2 Mendel's objections regarding *Younger* abstention and found them to be without merit. And to
3 the extent that Mr. Mendel's objections are grounded in the purported unlawfulness of Uber's
4 ridesharing business model, Plaintiffs correctly observe that the Ninth Circuit recently affirmed
5 the dismissal of such claims as barred by res judicata. *See Mendel v. Randolph*, No. 21-15910,
6 2022 WL 2526965, at *1 (9th Cir. July 7, 2022) ("Mendel's claims that Uber was violating federal
7 motor carrier and antitrust laws were 'based on the same nucleus of facts' as the claims
8 adjudicated in *Overton*."). As such, the Court finds that Mr. Mendel is not likely to succeed on the
9 merits of his appeal and this factor weighs decisively in favor of a bond.

10 In sum: out of the three factors, the first factor weighs slightly against imposing an appeal
11 bond, the second factor is neutral, and the third factor weighs strongly in favor of imposing an
12 appeal bond. As a result, the Court concludes that an appeal bond is warranted. Next, the Court
13 considers the appropriate amount of the appeal bond.

14 B. Appropriate Amount of the Appeal Bond

15 "It is well-established in the Ninth Circuit that Rule 7 permits only recoverable costs to be
16 included in an appellate bond. This includes the costs of appeal specified in Rule 39, unless a rule
17 or statute, such as an attorneys' fees shifting statute, explicitly provides for the recovery of
18 additional expenses." *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027-BLF, 2020 WL
19 1972501, at *3 (N.D. Cal. Apr. 13, 2020) (quoting *Vargas v. Ford Motor Co.*, No. 12-cv-08388,
20 2018 WL 2077943, at *1 (C.D. Cal. May 1, 2018)). Rule 39(e) costs include: (1) preparation and
21 transmission of the record; (2) the reporter's transcript; (3) premiums for a bond to preserve rights
22 pending appeal; and (4) the notice of appeal filing fee. Fed. R. App. P. 39(e). "Plaintiffs need not
23 provide an itemized breakdown of the anticipated appellate costs." *Tait v. BSH Home Appliances*
24 *Corp.*, No. 10-cv-0711, 2015 WL 12748268, at *2 (C.D. Cal. Oct. 19, 2015). "Rather, courts must
25 consider the types of costs requested and the reasonableness of the requests . . . in light of other
26 cases, and the statements in Plaintiffs' declaration." *Broomfield*, 2020 WL 1972501, at *3
27 (quoting *Tait*, 2015 WL 12748268, at *2).

28 Plaintiffs submit that the appropriate amount of the appeal bond is in the range of \$5,000 to

1 \$10,000. Pl. Resp. at 4. Plaintiffs specifically estimate that the costs of preparing the transcript of
 2 the final approval hearing and record on appeal, as well as attorneys fees associated with the
 3 prosecution of the appeal “are likely to amount to between \$5,000 and \$10,000 (if not more).” *Id.*
 4 Plaintiffs did not, however, provide an attorney declaration or any other evidence in support of
 5 their cost estimate. Nor did Plaintiffs provide any authority to support their theory that attorneys
 6 fees could be included in an appeal bond under these circumstances, even though these costs are
 7 not included in Rule 39(e). *See* Fed. R. App. P. 39(e).

8 “[C]ourts have routinely estimated that \$1,000 is all that is necessary to ensure payment of
 9 costs on appeal associated with Rule 39(e).” *Broomfield*, 2020 WL 1972501, at *4 (citing and
 10 collecting authorities); *see also Torczyner v. Staples, Inc.*, No. 16-cv-2965, 2017 WL 11421542, at
 11 *2 (S.D. Cal. Nov. 21, 2017) (“The Rule 39 costs (copying and record preparation costs) are not
 12 likely to exceed \$1,000.”); *Bickley*, 2016 WL 9114937, at *5 (“[T]he Court finds that a bond in a
 13 total amount of \$1,000.00 is all that is necessary to ensure payment of costs on appeal” to cover
 14 plaintiffs’ projected costs “to copy, prepare, and serve the record and relevant reporter
 15 transcripts”). In the absence of any evidence from Plaintiffs indicating that their allowable costs
 16 for purposes of an appeal bond exceed this amount, the Court will exercise its discretion and
 17 impose an appeal bond in the amount of \$1,000.

18 **V. CONCLUSION**

19 For the foregoing reasons, the Court **GRANTS IN PART** Plaintiffs’ request for an appeal
 20 bond and orders Mr. Mendel to post a bond in the amount of \$1,000 should Mr. Mendel wish to
 21 pursue his objections on appeal.

22 **IT IS SO ORDERED.**

23
 24 Dated: October 10, 2022



25
 26 EDWARD M. CHEN
 United States District Judge