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

10 IN RE: FERRERO LITIGATION

Case No. 3:11-cv-00205-H-KSC  
 Pleading Type: Class Action

**Objectors' Opposition to Plaintiffs' Motion  
 for Appeal Bond**

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1  
2 Movants ask that this Court require Drey and Pridham to post a \$21,970.72 bond to  
3 secure alleged “costs” pending appeal of a class-action settlement involving \$3.00 jars of  
4 Nutella. Judge Posner is widely quoted as saying “only a lunatic or fanatic sues for \$30”  
5 *Carnegie v. Household Finance Int’l, Inc.* 376 F.3d 656, 661 (7th Cir. 2004). He made this  
6 remark in the context of explaining why class actions were good, noting the alternative to  
7 a class action was not millions of individual suits, but no individual suits. The same  
8 reasoning can be applied here: only a lunatic or a fanatic would post a \$20,000 bond to  
9 proceed with an appeal over \$3.00 jars of Nutella. The instant motion should be  
10 recognized for precisely what it is – a transparent attempt to intimidate legitimate  
11 objectors in order to prevent them from pursuing their right to appeal by imposing  
12 needless and punitive financial barriers. This is unconstitutional. *Lindsey v. Normet*, 405  
13 U.S. 56, 77-79 (1972)(holding conditioning appeal on posting double bond  
14 unconstitutional).

15 Movants somehow try to claim the “high ground” by name-calling, making ad  
16 hominem attacks, and repeated (and false) allegations of frivolity and bad faith on the  
17 part of Drey, Pridham, and their counsel. They use the word “frivolous” or “bad faith”  
18 more than half-a-dozen times in their 10-page memorandum (Memo at p 1, 3, 4, 5, & 8).  
19 But the Ninth Circuit has made clear the district court cannot gauge appellate  
20 “frivolousness” prospectively, and such considerations are not at all germane to a Rule 7  
21 bond determination. *Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 960 (9<sup>th</sup> Cir.  
22 2007). Movants arguments to the contrary are thus, ironically, frivolous themselves and  
23 directly contrary to the Ninth Circuit’s decision in *Azizian*.

24 Movants then compound their frivolous conduct by falsely claiming that  
25 “administrative costs” and “post judgment” interest can be considering in making a Rule 7  
26 determination (Memo at 10). They cannot, and *Azizian*, made this plain. The two cases  
27 cited by movants in support of their assertions were from 2005 and 1997, respectively;  
28 they both pre-date *Azizian*. To cite district court decisions rendered prior to a governing  
Ninth Circuit decision, without disclosing they have been abrogated by that decision,

1 violates the duty of candor and Rule 11. Movants also make blatantly false statements  
2 about the motives of objectors and their counsel. In addition to being factually false, they  
3 are legally irrelevant; this argument too, is frivolous and sanctionable. Movants' conduct  
4 is unprofessional, sanctionable, and should not be countenanced by this Court.

5  
6 1. Even Assuming the Drey-pridham Appeal Is Frivolous, Which it Is Not, the Ninth Circuit  
7 Has Stated it Is Not the District Court's Role to Attempt to Make Such a Prediction.  
8 Movants "Frivolousness" Argument Is, Ironically, Frivolous.

9 First, let's take the allegations of the movants as true for the purposes of this  
10 argument. There is, of course, no legal authority that suggests movants would get such a  
11 presumption (they have the burden of proof after all), but assume it to be true for the sake  
12 of argument: the appeal is frivolous. The Ninth Circuit has been plain and unequivocal  
13 on this point, stating:

14 While we affirm the district court's decision on the  
15 merits, we do not conclude that Wilkinson's appeal  
16 is frivolous. Even if we were to conclude that her  
17 appeal was frivolous however, we would reverse the  
18 district court's inclusion of appellate attorneys fees  
19 on that basis.

20 *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 960 (9<sup>th</sup> Cir. 2007).

21 The Court explained that frivolousness determinations could not be made  
22 "prospectively, and without the benefit of a fully developed appellate record, whether such  
23 an award is likely." *Id.* The Ninth Circuit then stated it has ample methods of dealing  
24 with "frivolous" appeals (including initial screening, motion practice, and authority to  
25 sanction) and it – and it alone – is responsible for dealing with frivolous appeals; it is not  
26 incumbent on the district court to guess about the result. In so holding the Court stated:

27 We agree with the question of whether, or how, to deter  
28 frivolous appeals is best left to the courts of appeals...Allowing  
district courts to impose high Rule 7 bonds where the appeals  
might be found frivolous risks "impermissibly encumber[ing]  
appellants' right to appeal and "effectively preempting this  
court's prerogative" to make its own frivolousness  
determination.

*Id.* at 961, quoting *In re Am. President Lines*, 779 F.2d 714, 717 (D.C. Cir. 1985). In  
stressing how important it was not to chill appeals, the Ninth Circuit stressed, "any

1 attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.” *Id.* at  
2 961, quoting *Clark v. Universal Builders*, 501 F.2d 324, 341 (7<sup>th</sup> Cir. 1974).

3 Class counsel cites the governing case, *Azizian v. Federated Dep’t Stores, Inc.*, 499  
4 F.3d 950 (9<sup>th</sup> Cir. 2007), but only obliquely in its motion. The case is cited, but only as  
5 “cited in” two district court opinions interpreting and applying the decision: *In re*  
6 *Wachovia Corp*, and *Thalheimer v. City of San Diego*. As to the latter case, *Azizian* is  
7 cited for the proposition that “the costs identified in Rule 39(e) are among, but not  
8 necessarily the only, costs available on appeal.” The *Wachovia* citation is to an  
9 unpublished order against a pro se litigant who did raise the relevant arguments.

10 *Azizian* is especially important because it is the only Ninth Circuit case to discuss  
11 the issue of imposing a bond on an objector in a class action. There, the question was  
12 whether attorneys’ fees on appeal could be considered a “cost” in setting the amount of the  
13 bond. The court went to great lengths to analyze the law throughout the Circuits, and  
14 extensively analyzed the applicable cases. In framing the issue the court noted,

15 Whether attorney's fees are part of ‘costs on appeal’ under Rule  
16 7 is a question of first impression in this circuit. Six other  
17 circuits are split on the question. An older, minority rule, used  
18 by the D.C. and Third Circuits and endorsed by the Wright,  
19 Miller & Cooper treatise, holds that the ‘costs referred to’ in  
20 Rule 7 “are simply those that may be taxed against an  
21 unsuccessful litigant under Federal Appellate Rule 39, and do  
22 not include attorney's fees that may be assessed on appeal.” *In*  
23 *re Am. President Lines, Inc.*, 250 U.S. App. D.C. 324, 779 F.2d  
24 714, 716 (D.C. Cir. 1985) (per curiam) (footnote omitted); see  
25 also 16A Charles Alan Wright, Arthur R. Miller & Edward H.  
26 Cooper, *Federal Practice & Procedure* § 3953 (3d ed. 2006). The  
27 more recent, majority rule, adopted by the Second, Sixth, and  
28 Eleventh Circuits, holds that a district court may order security  
for appellate attorney's fees in a Rule 7 bond if they would be  
treated as recoverable costs under an applicable fee-shifting  
statute. See *In re Cardizem CD Antitrust Litigation*, 391 F.3d  
812, 817-18 (6<sup>th</sup> Cir. 2004); *Pedraza v. United Guaranty Corp.*,  
313 F.3d 1323, 1329-30 (11<sup>th</sup> Cir. 2002); *Adsani*, 139 F.3d at 71.  
Finally, the First Circuit has held that a district court may  
require a Rule 7 bond covering appellate attorney's fees if it  
concludes that the court of appeals might award attorney's fees  
as costs under Rule 38 because the appeal is frivolous. *Skolnick*  
*v. Harlow*, 820 F.2d 13, 15 (1<sup>st</sup> Cir. 1987) (per curiam).

*Azizian*, 499 F.3d at 955.

1 On the question of attorneys' fees, the Court went on to agree with what it  
2 described as the "majority rule," – specifically, adopting the *Marek v. Chesney* approach to  
3 determining "costs" under Rule 68: look to the underlying statute. Here, attorneys' fees  
4 are not defined as part of costs under any of the underlying statutes, and movants do not  
5 claim as such. The Ninth Circuit's discussion and analysis, however, is essential because  
6 it defines the relevant principles that should underlie making the determination  
7 requested by movants. Movants could have, and should have, been more forthcoming in  
8 the way they cited *Azizian*.

9 **2. Movants Request an Unconstitutionally Punitive Bond.**

10 Punitive bond requirements are unconstitutional. *Lindsey v. Normet*, 405 U.S. 56,  
11 77-79 (1972)(holding conditioning appeal on posting double bond unconstitutional). *North*  
12 *Carolina v. Pearce*, 395 U.S. 711, 724 (1969) ("A court is 'without right to . . . put a price  
13 on an appeal.'") Moreover, a cost requirement, otherwise valid on its face might be  
14 unconstitutional as applied to a particular case, see *Boddie v. Connecticut*, 401 U.S. 371,  
15 379-81, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971); *Clark v. Universal Builders*, 501 F.2d 324,  
16 341 (7<sup>th</sup> Cir. 1974)("any attempt by a court at preventing an appeal is unwarranted and  
17 cannot be tolerated"); *American Presidential Lines*, 779 F.2d 714, 718-19, n.38 (D.C. Cir.  
18 1985). As the cases cited by American Presidential stress, the concern is of constitutional  
19 import:

20 See [North Carolina v. Pearce, 395 U.S. 711, 724, 89 S. Ct. 2072,](#)  
21 [2080, 23 L. Ed. 2d 656, 669 \(1969\)](#)("[a] court is 'without right to .  
22 . . . put a price on an appeal. A defendant's exercise of a right of  
23 appeal must be free and unfettered"), quoting [Worcester v.](#)  
24 [Commissioner, 370 F.2d 713, 718 \(1st Cir. 1966\)](#); [Short v.](#)  
25 [United States, 120 U.S. App. D.C. 165, 167, 344 F.2d 550, 552](#)  
26 [\(1965\)](#) ("punishment could not be increased to penalize a  
27 defendant for exercising his right of appeal"); [Poplar Grove](#)  
28 [Planting & Ref. Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189,](#)  
[1190 \(5th Cir. 1979\)](#) ("[a] supersedeas bond should not be used  
as a penalty for a party availing itself of its appeal rights");  
[Clark v. Universal Builders, Inc., 501 F.2d 324, 341-342](#) (7th  
Cir.), cert. denied, [419 U.S. 1070, 95 S. Ct. 657, 42 L. Ed. 2d 666](#)  
[\(1974\)](#) ("any attempt by a court at preventing an appeal is  
unwarranted and cannot be tolerated"); [Jones v. Penny, 387 F.](#)  
[Supp. 383, 396 \(M.D. N.C. 1974\)](#) (three-judge court) ("we think it  
clear from established decisional law, in both criminal and civil  
contexts, that a state in granting the right to appeal an adverse

1 decision cannot penalize or arbitrarily condition that right”);  
2 [Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208, 211](#)  
3 [\(1972\)](#) (state constitution “having created [a] right of appeal, the  
4 statutes adopted and the rules promulgated in implementation  
of that right may not serve to discriminate against appellants by  
reason of the inability to furnish an appeal bond”). See also  
[Starks v. Klopfer, 468 F.2d 796 \(7th Cir. 1972\)](#).

5 Id.

6 Fed. R. App. Pro. 7 limits the court’s discretion to impose an appeal bond to costs  
7 available under Fed. R. App. Proc. 39; these costs do not include the costs claimed by  
8 movants in this case. Movants do not cite to any authority that “administrative costs” or  
9 “post-judgment interest” can be considered as part of a Rule 7 bond. Even cases they do  
10 cite, like Embry, hold such “costs” are not recoverable. 2012 U.S. Dist. LEXIS 78068 at \* 5  
11 (“The Court finds, however, that unlike costs, which may be included in the value of a  
12 bond under [Rule 7](#), such anticipated damages may not be required as part of a bond”).

13 The only possible costs are copying and mailing the response brief. Appellants Drey  
14 and Pridham are the ones responsible for submitting the transcripts and record, thus, the  
15 only conceivable costs are the costs of reproducing and mailing a response brief. Here, Mr.  
16 Fitzgerald makes a conclusory assertion – totally without analysis – that he “estimates  
17 appellate courts to be \$15,000.” Where did this number come from? Did he pull it out of  
18 the air? Citation to other records, in other cases, does not meet even the most  
19 rudimentary of an evidentiary standard.

20 The page limit for a brief in the Ninth Circuit is 30 pages, 9 paper copies need be  
21 served on the court and opposing counsel, the cost of binding and covers is a few dollars.  
22 The Ninth Circuit limits copy costs to 10 cents per page. So the costs of a response brief  
23 are  $9 \times 30 \times .10 = \$27.00$ . Add another \$10.00 per brief for binding, postage and a  
24 supplemental appendix, and the cost is \$117.00. It is not conceivable that the response  
25 brief will cost more than \$250.00. Imposing a bond seeking to secure any additional  
26 “costs” would amount to an unconstitutional penalty. Cf. *Lindsey v. Normet*, 405 U.S. 56,  
27 77-79 (1972)(holding conditioning appeal on posting double bond unconstitutional).

1 **3. A Rule 7 Appeal Bond May Not Include Costs of Delay**

2 Reflecting a lack of knowledge of the difference between a supersedeas bond and a  
3 Rule 7 cost bond, movants make the frivolous assertion that Drey and Pridham should be  
4 held accountable for any delay in distribution of the proceeds. But Drey and Pridham have  
5 not sought any stay of judgment, so this court is without authority to issue a supersedeas  
6 bond. American Presidential Lines, 779 F.2d at 717-18; cited with approval by Azizian,  
7 499 F.3d at 961; Fleury v. Richemont North America, Inc., 2008 WL 4680033 at \*7 (N.D.  
8 Cal. October 21, 2008 (cost of delay not appropriately included in cost bond); Embry v.  
9 ACER, 2012 U.S. Dist. LEXIS 78068 (N.D. Cal. June 5, 2012)(same)(cited by movants,  
10 showing knowledge of the frivolousness of their position).

11 The reason the claims are not being paid pending appeal is because movants agreed  
12 to that provision – they secured for themselves, of course, a quick-pay provision that  
13 ensured that they themselves were paid. They did not insist, of course, on a parallel  
14 protection for their fiduciaries.

15  
16 **4. Appeal Bonds Create Needless Obstacles for Objectors in Violation the Supreme  
17 Court’s Reasoning in *Devlin V. Scardelletti***

18 In *Devlin v. Scardelletti*, 536 U.S. 1 (2002) the United States Supreme Court  
19 established the right of objectors to appeal without first seeking intervention. The court  
20 was motivated by eliminating needless barriers to objector seeking review, stating: formal  
21 intervention would only “add an additional layer of complexity before the appeal of the  
22 settlement approval may finally be heard.” Imposing a bond would likely simply result in  
23 a second appeal of the bond requirement, as it did in *In re Wal-Mart Wage & Hour Empl.*  
24 *Practices Litig.*, 10-155116, Dkt. No. 11 (9<sup>th</sup> Cir Jun. 3, 2010), which merely stayed the  
25 motion pending the merits determination. *Id.* citing *Vaughn v. Am. Honda Motor Co.*, 507  
26 F.3d 295 (5<sup>th</sup> Cir. 2007). And the Ninth Circuit recently did the same thing in the  
27 *MagSafe* appeal. See Ninth Circuit docket 12-15782 (Order September 2012).

28 If movants were truly concerned about the risk of delay from a “frivolous” appeal,  
they would have moved to dismiss the appeal instead of initiating collateral litigation in

1 the district court. Motions such as the instant motion only multiply the proceedings, and  
2 movants are doing so vexatiously – this is reflected both by the needless and false personal  
3 attacks, and the frivolous citations to superseded case law.

4  
5 **5. There Is No Evidence on Ability to Pay; Both Objectors Reside in the State, Thus  
6 There Is Little Risk of Non-payment.**

7 Finally, there is no evidence submitted that Drey or Pridham have the ability to pay. No evidence  
8 is submitted as to Drey. The fact that Pridham happens to be married to a lawyer is not evidence of  
9 ability to pay. Nonetheless, this is not a concern because there is no evidence that any of Drey, Pridham,  
10 or their counsel have ever refused to pay costs. And in the Ninth Circuit, if a lawyer fails to pay  
11 sanctions or costs they can be barred from practicing before the court until the sanction is paid. The appeal  
12 is meritorious, and certainly not frivolous; there is no evidence Drey or Pridham can post a bond, which  
13 is unreasonable given both the value of the claims and the nature of the anticipated costs – the single  
14 filing or a response brief. Moreover, if the Ninth Circuit does order costs, there is no evidence Drey or  
15 Pridham would refuse. There is no genuine lack of security. The lodestar fee spent by class counsel  
16 preparing the motion likely exceeds the actual “costs” that will be incurred in filing and serving a  
17 response brief. In any event, there is no evidence whatsoever of those costs.

18 For the above reasons, Objectors respectfully request that no appeal bond be imposed.

19 Respectfully Submitted, this 29<sup>th</sup> day of October 2012.

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28

CERTIFICATE OF SERVICE BY ECF

I hereby certify that on October 29, 2012, I caused the foregoing Objectors' Opposition to Plaintiffs' Motion for Appeal Bond to be served via ECF noticing upon those counsel of record who are registered for electronic filing.

/s/ Grenville Pridham  
Grenville Pridham