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Class Counsel

11 **UNITED STATES DISTRICT COURT**
 12 **SOUTHERN DISTRICT OF CALIFORNIA**

14
 15 **IN RE FERRERO LITIGATION**

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

DECLARATION OF JACK FITZGERALD IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR APPEAL BOND

Judge: The Honorable Marilyn L. Huff
 Hearing: November 13, 2012
 Time: 10:30 a.m.
 Location: Courtroom 13

1 I, Jack Fitzgerald, declare:

2 1. I am a member in good standing of the State Bars of California and New York; and of
3 the United States District Courts for the Northern, Central, and Southern Districts of California and the
4 Southern and Eastern Districts of New York; and of the United States Court of Appeals for the Ninth
5 Circuit. I am Class Counsel in the above-captioned action. I make this declaration in further support of
6 Plaintiffs' Motion for Appeal Bond.

7 2. Attached hereto as **Exhibit 1** is a true and correct copy of a November 3, 2012 e-mail I
8 received from Drey and Pridham's counsel titled "Fwd: Rule 11 Motion."

9 3. Attached hereto as **Exhibit 2** is a true and correct copy of the Emergency Motion Filed
10 Pursuant to Circuit Rule 27-3, in the case *In re Wal-Mart Wage & Hour Empl. Practices Litig.*, No. 10-
11 15516 (9th Cir.), Dkt. No. 8-1.

12 4. Attached hereto as **Exhibit 3** is a true and correct copy of the Order Granting the
13 Emergency Motion in the case *In re Wal-Mart Wage & Hour Empl. Practices Litig.*, No. 10-15516 (9th
14 Cir.), Dkt. No. 11.

15 5. Attached hereto as **Exhibit 4** is a true and correct copy of Order denying Appellant's
16 Motion to Vacate the Appeal Bond in *In re Magsafe Apple Power Adapter Litigation*, No. 12-15782
17 (9th Cir.), Dkt. 41.

18
19 I declare under penalty of perjury that the foregoing is true and correct to the best of my
20 knowledge. Executed on November 6, 2012 in San Diego, California.

21 /s/ Jack Fitzgerald
22 Jack Fitzgerald

EXHIBIT 1

From: [Christopher Langone](#)
To: jack@westonfirm.com
Cc: [Grenville Pridham](#); [Mark Lavery](#)
Subject: Fwd: Rule 11 Motion
Date: Saturday, November 03, 2012 5:01:44 PM
Attachments: [Exhibit A Group On opinion.pdf](#)
[Exhibit B Kane LCD OBJECTION#1.pdf](#)
[Exhibit C - Email to Alioto.pdf](#)
[Exhibit D Langone motion for sanctions.pdf](#)
[Exhibit E Response to sanctions class maters.pdf](#)
[Exhibit F Langone Reply.pdf](#)
[Exhibit G Langone motion.pdf](#)
[Exhibit H LANGONE CERTIFICATION - FINAL.pdf](#)
[Exhibit I 12-15-11.PDF](#)
[Exhibit J Cobell v. Salazar.pdf](#)
[Draft rule 11 motion - sent 11.3.12.pdf](#)

Mr. Fitzgerald:

The motion you filed to require a bond from Ms. Pridham violates Rule 11. In accordance with the so-called safe harbor provisions of FRCP 11(c)(2), a draft motion is attached. Demand is hereby made that you withdraw your false pleading on or before November 26, 2012. Failure to do so will result in the filing of the attached motion.

Very Truly Yours,

By: Christopher V. Langone
Mark Lavery
Grenville Pridham

_____ Information from ESET NOD32 Antivirus, version of virus signature database 7656
(20121103) _____

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

EXHIBIT 2

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No. 10-15516

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: STEPHANIE SWIFT, FATIMA ANDREWS,
JESSICA GAONA AND DEBORAH MADDOX
Appellants,

v.

Nancy Hall, Plaintiff,
Wal-Mart, Inc., Defendant,

Appellees.

**EMERGENCY MOTION FILED PURSUANT
TO CIRCUIT RULE 27-3**

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Circuit Rule 27-3 Certificate

Counsel for Appellants:

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Facts Supporting Emergency:

The district court case is an MDL litigation involving a class of hourly wage employees working for Wal-Mart. The appellants herein objected to the amount of attorney's fees as part of the final proposed settlement. They took appeal in November 2009 as to the attorney fees only and that case is pending before this

1 Court, case number 09-17648, 09-17682 and 09-17683, consolidated for briefing.

2 On March 8, 2010, the district court entered an order requiring each of the
3 Appellants herein to post an appeal bond in the amount of \$500,000—a total of
4 \$2,000,000. (See Exhibit A.) The bonds were to be posted by March 29, 2010.

5
6 (Id.)

7
8 The appellants appealed the order to this Court on or about March 9, 2010.
9 They mistakenly believed that since the only issue on appeal was the bond, that the
10 district court no longer had jurisdiction to enforce the bond order once the appeal
11 was taken to this Court. Additionally, even as of today's date, the distribution of
12 the settlement funds has not been delayed because approval of the home office part
13 of the settlement is not final.

14
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16 On May 7, 2010 a hearing was held before the district court to address
17 objections to the home office settlement. The appellants herein were not a party to
18 those objections. Thus, neither the appellants nor their counsel attended the
19 hearing. At the hearing, class counsel advised the district court that the appellants
20 herein had not posted their bond as required on or before March 29, 2010, and they
21 orally requested an order to show cause. The district court entered a minute order
22 requiring counsel for the appellants herein to show cause why the bond had not
23 been posted and set a hearing on the Order to Show Cause for May 18, 2010. (See
24 Exhibit B.)

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28 The appellants herein sought emergency assistance from this Court, via

1 motion, on May 11, 2010. They had not, however, filed a motion in the district
2 court asking the district court to stay its appeal bond order. On May 13, 2010, the
3 appellants herein filed a Motion to Stay the Bond Order in the district court. (*See*
4 Exhibit C.) The appellants herein also sought a continuance of the hearing
5 scheduled for May 18, 2010. (*See* Exhibit D.) The hearing requesting a
6 continuance was denied. (*See* Exhibit E.)

9 On May 18, 2010, this Court entered its order denying the Motion to Vacate
10 the show cause hearing scheduled in the district court for May 18, 2010.

11
12 On May 18, 2010, counsel for the appellants herein appeared before the
13 district court on the Court's minute order to show cause. On that date, the district
14 court heard argument from the parties and took the matter under submission. (*See*
15 Exhibit F.) The district court also allowed class counsel one week to respond to
16 the Motion to Stay Bond on Appeal filed by the appellants, but stated that no reply
17 would be permitted. During the oral argument, counsel for the appellants herein
18 advised the district court that the appellant objectors were unable to post a \$500,000
19 bond or a collective bond of \$2,000,000 as they had been, after all, hourly wage
20 employees of Wal-Mart who had standing to file the objections. The appellants
21 also filed a Supplement to their Motion to Stay Bond on May 21, 2010, that
22 included affidavits from each of the appellants affirming their inability to post a
23 \$500,000 bond. (*See* Exhibit G, G-1, G-2, G-3 and G-4.)

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28 On May 24, 2010, class counsel filed their Responses to the Motion to Stay

1 Bond. (*See Exhibits H and I.*) On May 25, 2010, the district court issued its
2 order denying the Motion to Stay Bond and sanctioning each appellant and their
3 counsel herein \$10,000, a total of \$40,000.¹ (*See Exhibit J.*) The Order specifies
4 that the appeal bonds, in the amount of \$500,000 per objector/appellant, are to be
5 posted by **June 3, 2010.** (*Id.*)
6
7

8 This emergency Motion follows.

9 **Notification of Other Counsel and the Court:**

10 Counsel for all other parties were served with a copy of this Emergency
11 Petition by email on the date it was filed.
12

13 **FED R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT**

14 Appellants Stephanie Swift, Fatima Andrews, Jessica Gaona and Deborah
15 Maddox state that they are individuals, not publicly held corporations.
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¹ The parties do not seek relief from the sanction portion of the order herein.
28 They will address the propriety of the sanction order via a separate appeal.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **EMERGENCY MOTION TO STAY BOND ORDER**
3

4 The issue presented is whether the district court violated clear Ninth Circuit
5 precedent by prejudging the merit of appellants' appeals, and imposing an appeal
6 bond in the absurd and arbitrary amount of \$2,000,000 that is clearly intended to
7 chill appellants' appeal rights, and to force them to drop their properly filed (and
8 already briefed) appeals.
9

10 Rule 8 of the Federal Rules of Appellate Procedure permits this Court to
11 entertain a motion to stay a judgment or an order if the motion has been denied by
12 the district court, or, if the parties can demonstrate why it is not practical to bring
13 such a motion in its first instance to the district court. Here, the district court has
14 denied the appellants' Motion to Stay the Bond order.
15
16

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18 **Facts**

19 Each of the appellants is an hourly Wal-Mart employee and a class member
20 in a settled class action against Wal-Mart for wage and hour violations of the Fair
21 Labor Standards Act, as well as other statutes, pending in the United States District
22 Court for the District of Nevada. Each of the appellants filed a timely objection to
23 the attorney's fees requested by class counsel, which fees will be deducted from,
24 and reduce, the fund available to satisfy class members' claims. After the district
25 court approved an award of attorney's fees to class counsel on November 20, 2009,
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1 each of the appellants filed an appeal from that award.² The Appellants filed their
2 opening Brief in those appeals on April 26, 2010, and the Appellees have now filed
3 a Motion to Dismiss that appeal.
4

5 On March 8, 2010, the district court entered an Order imposing an appeal
6 bond on each of the Appellants in the amount of \$500,000, for a total of
7 \$2,000,000, as a condition for maintaining their appeals of the district court's fee
8 award to class counsel.³ The appellants herein filed an appeal from the district
9 court's March 8, 2010 bond Order on March 9, 2010 (No. 10-15516). Appellants'
10 opening brief in this appeal, No. 10-15516, is due on June 17, 2010.
11
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13 On May 7, 2010, at a hearing on the approval of a separate settlement
14 unrelated to the issues on appeal, and without any prior motion or notice to the
15 Appellants, counsel for Defendant Wal-Mart, Brian Duffy, moved orally *ex parte*
16 for an Order to Show Cause Hearing for the objectors to show cause why they have
17 not posted the \$2,000,000 appeal bond that is currently on appeal to this Court.
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22 ² Those appeals are Nos. 09-17648, 09-17682, and 09-17683.

23 ³ The Class Plaintiffs maintain that the astronomical amounts of the bonds are
24 necessary to protect class members who submitted claims for settlement funds, but
25 the Appellants' appeals, however, do not prevent the distribution of those funds in
26 any way. The appeals seek to augment the amount that will be paid to class
27 members, and therefore there is no reason why the amounts that the district court
28 awarded to the claimants could not be distributed to them immediately. If class
counsel's fees are reduced on appeal, that would merely create an opportunity for a
second distribution or *cy pres* award.

1 (See Exhibit B.) The district court then set the Show Cause Hearing on May 18,
2 2010, just eleven days from the date of the minute order. *Id.*

3
4 The Bond Order entered by the district court requires each of the four
5 Appellants to pay the amount of \$500,000 each as a prerequisite for maintaining
6 their appeals from an award of attorney's fees to class counsel in the underlying
7 class action. The district court ordered the appeal bonds based on its opinion that
8 the appeals were "frivolous," in flagrant violation of this Court's decision in *Azizian*
9 *v. Federated Dept. Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007). In *Azizian*, this Court
10 held that a district court may not prejudge the frivolousness of an appeal when
11 setting an appeal bond:
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14 Award of attorney's fees for frivolousness under Rule 38 is
15 highly exceptional, making it difficult to gauge prospectively, and
16 without the benefit of a fully developed appellate record, whether such
17 an award is likely... Moreover, a Rule 7 bond including the potentially
18 large and indeterminate amounts awardable under Rule 38 is
19 more likely to chill an appeal than a bond covering the other smaller,
20 and more predictable, costs on appeal... [O]nly the court of appeals
21 may order the sanction of appellate attorney's fees under Rule 38.

22 *Id.* at 960.

23 The district court's Bond Order states that "this Court finds that the Appeals
24 taken by Objectors Gaona, Swift, Andrews and Maddox, are frivolous" (See
25 Exhibit A, at p. 3.) Clearly, the district court imposed the extraordinary and
26 arbitrary bonds in the amount of \$500,000 per objector, or \$2,000,000 total, as a
27 sanction for what the district court deemed in advance to be a frivolous appeal,
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1 usurping this Court's exclusive authority to determine an appeal's frivolousness
2 after full briefing and argument.⁴
3

4 **Argument**

5 This Court must grant the appellants' emergency motion to stay in order to
6 preserve the Appellants' right to pursue their properly filed and perfected appeals
7 that are currently pending in this Court, unencumbered by unlawful, unauthorized
8 and arbitrary appeal-chilling appeal bonds imposed on the whim of the district
9 court. The appeal bond imposed by the district court is a clear abuse of discretion
10 and authority on its face.
11

12 If the appellants are required to post a \$500,000 bond each, they will be
13 forced to dismiss their appeal. (See Exhibits G-1, G-2, G-3 and G-4, Affidavits of
14 Appellants Andrews, Swift, Maddox and Gaona.) The appellants are unable to
15 post a collective bond in the amount of \$2,000,000.
16

17 First, the appellants have appealed the appeal bond Order to this Court, and
18 briefing is due in that appeal in less than four weeks. In *Azizian v. Federated Dept.*
19 *Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007), this Court made clear what avenues are
20 available to appellees who wish to cut short an appeal that they deem to be
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25 ⁴ There is no underlying statute that would authorize the bonding of any costs not
26 explicitly included in FRAP 39, *see Azizian, supra*, at p. 959-960, and therefore
27 there is no alternative basis for the Court's imposition of the shocking and
28 disproportionate bonds.

1 frivolous:

2 We agree with the D.C. Circuit that the question of
3 whether, or how, to deter frivolous appeals is best left to the
4 courts of appeals, which may dispose of the appeal at the outset
5 through a screening process, grant an appellee's motion to
6 dismiss, or impose sanctions including attorney's fees under
7 Rule 38.

8 *Id.* at 961. As the above quote makes clear, the appellees in the predicate appeals
9 are not without options to dispose of the appeals if they truly believe that they are
10 frivolous.

11 Second, the appeal bond imposed by the district court is a clear violation of
12 *Azizian, supra*. The district court clearly prejudged the frivolousness of the fee
13 appeals, thus usurping this Court's sole prerogative to make that determination, and
14 set the bond at an amount that was obviously designed to deprive the appellants of
15 their appellate rights if the bond is not stayed by this Court. One of the factors in
16 setting an appeal bond is the appellant's ability to pay. The appellants are low-
17 wage hourly workers, and this Court may take judicial notice that none of the
18 appellants has the current financial ability to pay that amount, let alone to pay it for
19 the right to pursue their legitimate appeals to this Court. (*See Exhibits G-1, G-2, G-*
20 *3 and G-4.*)

21 Finally, the district court imposed sanctions of \$10,000 each upon the
22 appellants, despite the fact that they had filed with the district court proof of the
23 impossibility of performance. (*Id.* and *Exhibit J.*) Additionally, even though the
24 district court was aware that the appellants were financially unable to post the
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1 appeal bonds, it ordered the appellants to post the \$500,000 bonds by June 3, 2010,
2 or face further sanctions. Thus, the appellants are faced with the following choices:
3 (1) dismiss their appeals pending before this Court by June 3, 2010, or (2) face the
4 risk of further or repeated sanctions orders until this Court reverses the district
5 court's appeal bond. It is these options that necessitate this Emergency Motion.
6
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8 The central holding of *Azizian* is that a district court should not force
9 appellants to dismiss their appeals before this Court has had an opportunity to
10 consider them. Without intervention by this Court staying the appeal bond order of
11 the district court, the appellants will be forced to dismiss their appeals. The district
12 court was fully aware of the impossibility of performance of its order. The
13 appellants' only recourse cannot be to weather a volley of periodic sanctions orders
14 mitigated only by the right to appeal them. A sanctions order causes damage both
15 to the appellants and to their counsel that cannot be fully remedied by reversal of
16 the order imposing a \$2,000,000 or the order demanding sanctions at a later point in
17 time. There is a punitive aspect to a sanctions order that appellants should not be
18 required to endure in order to vindicate their right to appeal, and to have the facially
19 improper appeal bond reversed.
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24 Furthermore, a court that issues orders that are impossible to comply with
25 does irreparable damage to the federal judiciary because the resulting *apparent*
26 disobedience of that order ironically undermines the authority of the court. Judge
27 Pro may just as well have ordered the appellants to plug the BP oil leak in the Gulf
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1 of Mexico by June 3, 2010. This Court, in turn, should not require appellants to
2 pursue a remedy that will cause collateral damage to the federal courts by requiring
3 continued disobedience of a court order.
4

5 **CONCLUSION**

6
7 For the foregoing reasons, this Court should issue an order staying the bond
8 orders entered by the district court on March 8, 2010 and on May 25, 2010.

9 */s/ Lisa A. Rasmussen*

10 _____
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STATEMENT OF RELATED CASES

Plaintiff-Appellee's appeal in 08-80101 has been stayed pending the outcome the Appellants' appeals. Appellants' bond appeal is No. 10-15516. Appellants' fee appeals are Nos. 09-17648, 09-17682, and 09-17683.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all parties registered for electronic filing in this action, on this the 27th day of May 2010.

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/s/ Lisa A. Rasmussen
Lisa A. Rasmussen, Esq.

EXHIBIT 3

FILED

UNITED STATES COURT OF APPEALS

JUN 03 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: WAL-MART WAGE AND HOUR
EMPLOYMENT PRACTICES
LITIGATION.

No. 10-15516

D.C. No. 2:06-cv-00225-PMP
District of Nevada,
Las Vegas

NANCY HALL; et al.,

Plaintiffs - Appellees,

ORDER

STEPHANIE SWIFT; et al.,

Objectors - Appellants,

v.

SAM'S WEST, INC.; et al.,

Defendants - Appellees.

Before: KOZINSKI, Chief Judge, and LEAVY, Circuit Judge.

Appellants' emergency motion to stay the May 25, 2010 district court order is granted. *See Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007).

Payment of the assessed appellate bond is stayed pending this appeal.

The briefing schedule established previously shall remain in effect.

KB/MOATT

EXHIBIT 4

FILED

UNITED STATES COURT OF APPEALS

SEP 06 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: MAGSAFE APPLE POWER
ADAPTER LITIGATION.

NAOTAKA KITAGAWA, Jr.; et al.,

Plaintiffs - Appellees,

v.

ROBERT JOSEPH GAUDET, Jr.,

Plaintiff - Appellant,

v.

APPLE, INC.,

Defendant - Appellee.

No. 12-15757

D.C. No. 5:09-cv-01911-JW
Northern District of California,
San Jose

ORDER

In re: MAGSAFE APPLE POWER
ADAPTER LITIGATION.

NAOTAKA KITAGAWA, Jr.; et al.,

Plaintiffs - Appellees,

v.

No. 12-15782

D.C. No. 5:09-cv-01911-JW
Northern District of California,
San Jose

AT/MOATT

MARIE GRYPHON, Objector,
Plaintiff - Appellant,
v.
APPLE, INC.,
Defendant - Appellee.

Before: REINHARDT and BEA, Circuit Judges.

The court's September 5, 2012 order is amended as follows:

Appellant Marie Gryphon's motion to vacate the appeal bond order is denied without prejudice to renewing the arguments in the opening brief. *See Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007).

The previously established briefing schedule remains in effect.