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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

5 UNITED STATES DISTRICT COURT

6 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

7 IN RE FERRERO LITIGATION

) Case No. 11-cv-205 H (CAB)

) OBJECTOR MICHAEL E. HALE'S

) RESPONSE IN OPPOSITION TO

) MOTION FOR APPEAL BOND

10 COMES NOW Objector, Michael E. Hale ("Hale"), and files this Response in Opposition to
11 Plaintiffs' Motion for Appeal Bond.

12 INTRODUCTION

13 Plaintiffs filed a Notice of Motion and Motion for Appeal Bond and state that a bond should
14 be set to insure the payment of the following components likely to be by the Court of appeal: costs
15 incurred in opposing the appeal, administrative costs of keeping in contact with claimants about the
16 status of their claim pending appeal and post judgment interest which total \$21,970.72. None of
17 these reasons support the necessity for a bond. Importantly, Hale has never failed to pay costs on
18 appeal for any appeal of any objection he has filed or related to any class settlement where he was
19 ordered by the court to do so. The risk that he will fail to pay costs on appeal in this case if ordered
20 to do so in a final non-appealable order is not a risk that justifies a cost bond.

21 Hale seeks leave to file this response to the extent necessary. It is going to be filed on the
22 submission date via federal express and Hale respectfully requests that the Court consider this
23 response.

24 More to the point, the issues are not whether objectors are "serial objectors" or what
25 incidental costs might be, but rather whether the appeal itself is frivolous and whether or not a bond
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1 is necessary to insure payment of the direct costs of appeal. The answer to both questions is “no”.
2 Rule 7 FRAP requires a bond only if necessary to insure payment of costs on appeal. Drey and
3 Pridham objectors have paid all costs on appeal in every case in which they were involved.
4 “Frivolous appeal”, on the other hand, is a question for the Court of Appeals (see below).

5
6 A. Supposed Grounds for a Cost Bond

7 The basis of Class Plaintiffs’ argument to require the posting of a bond is that the appeals
8 being filed are without merit and are being filed by serial or professional objectors.

9 RESPONSE

10 Class Plaintiffs sought a class definition that incorporated Michael Hale into the class. Class
11 Plaintiffs based their application for incentive awards and their attorneys’ fees on the supposed
12 “benefits” conferred upon the class which included Michael Hale. After shaping the class to
13 include Michael Hale they cannot now be heard to complain of objectors inclusion in the action, or
14 any hardship their inclusion might cause.
15

16 B. Class Counsel’s Motion Is Inappropriate

17 Class Plaintiffs may obtain a bond for anticipated costs under Rule 7 FRAP, but those costs
18 are limited to those set forth in Rule 39 FRAP. The bond sought is not conservative and is not for
19 costs, but rather to deter appeals. Class Plaintiffs’ claimed bond cost items are not bondable on
20 appeal under the facts of this case. Even if objectors’ appeal is unsuccessful, Plaintiffs would not be
21 allowed to recover “incidental costs”. Under Rule 7 FRAP, a bond cannot include attorneys’ fees or
22 administrative costs. Objectors/Appellants’ objections to the Settlement, Class Counsel’s attorneys’
23 fees, and their appeal from the order overruling their objections to the settlement are facially not
24 frivolous and their appeal is highly unlikely to be declared so by the appellate panel.
25

26 It is clear that Class Counsel is seeking a total bond of \$21,970.72 in an attempt to stifle
27 objectors’ appeal from this Court’s approval of the settlement and their attorneys’ fees. That is not
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1 a proper use of the rules relating to bonding, and the Court should not allow it pursuant to Rule 7
2 FRAP.

3 C. Neither the Objections to Attorneys' Fees or the Appeals Are Frivolous

4 The overarching theme of Class Plaintiffs' request for a total bond of \$21,970.72 bond in
5 this case is that Objectors/Appellants' objection to the settlement and Class Counsel's fees are
6 frivolous, and that Objectors/Appellants' counsel are "professional objectors" who pursue
7 objections for improper purposes. The allegation is made that by filing appeals, the objectors hope
8 to receive fees but it goes without saying that Class Counsel can simply refuse and allow the appeal
9 to be decided by an appellate court. Thus the remedy they seek is one they already possess.
10

11 First, an appeal is frivolous if "the result is obvious or if the claims of error are wholly
12 without merit." *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983).
13

14 The fact that there is a body of federal jurisprudence regarding attorney's fees shows
15 reasonable people often differ on this issue. 28 U.S.C. Section 1927 which might support a bond
16 for "vexatious litigation conduct," is inapplicable to this appeal as it requires "bad faith or
17 intentional misconduct by counsel." Although the imposition of attorney's fees on appeal as a
18 sanction is allowed under rule 38 FRAP, it is only available after the appeals court finds the appeal
19 frivolous, and only upon further motion and hearing. See *Azizian v. Federated Department Stores,*
20 *Inc.*, 499 F.3d 950, 960 (9th Cir. 2007).
21

22 It is well established that whether an appeal is frivolous is solely within the purview of the
23 appellate court, not the district court. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295,
24 299 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 407 (1990); *In re American*
25 *President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985). Only the appellate court has the
26 authority to impose sanctions for a frivolous appeal. *Azizian*, 499 F.3d at 960; *In re Vasseli*, 5 F.3d
27
28

1 351, 353 (9th Cir. 1993) citing *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir.
2 1985).

3 D. Bondable Costs Do Not Include Additional Administrative Expenses, Delay in
4 Distribution or Attorney's Fees

5 Apart from their claim that frivolity of the appeal supports a bond for attorneys' fees, Class
6 Plaintiffs suggest that this Court has the authority to include prospective attorneys' fees as items of
7 Rule 7 FRAP costs. In fact, the majority rule among circuit courts, endorsed by the Second, Sixth,
8 Ninth and Eleventh Circuits, is that a district court may include attorney's fees in a rule 7 Bond, but
9 only if those attorney's fees would be considered recoverable costs under an applicable fee shifting
10 statute. See *Azizian*, 499 F.3d at 958.

11
12 The bond that Class Plaintiffs seek is simply not permitted by Rule 7 FRAP where a court's
13 discretion is limited to costs available under rule 39 FRAP. Class Plaintiffs have made no showing
14 that these appellate costs supposedly caused by the Objectors/Appellants will be anywhere near
15 \$160,000 that is sought. Costs recoverable under Rule 39 FRAP for an appellee and thus allowed to
16 be included in a Rule 7 FRAP appeal bond are the 'necessary copies of a brief or appendix,'
17 "preparation and transmission of the record," and "the reporter's transcript."

18
19 The Plaintiffs have no grounds to insinuate that an appeal by Michael Hale, or indeed any of
20 the other appeals, is in bad faith. The attempt to require objectors to each post a bond in varying
21 amounts is nothing but a thinly disguised attempt to deny class members their rights to have the
22 settlement reviewed.

23 Plaintiffs are incorrect that there is no good faith basis for appealing the court's order
24 approving settlement. Appeals should be decided by appellate courts; and to the extent that an
25 appellate court finds an appeal is "frivolous," the remedy is a motion in the appellate court under
26 Rule 38 FRAP and/or a Rule 27 FRAP motion to summarily dismiss an appeal, not a district court
27 order issuing a punitive 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 By failing to present any evidence of actual marginal appellate costs in their motion, Plaintiffs have
4 waived the issue. There is no basis for a bond, period.

5
6 E. Other Responses

7 Michael E. Hale hereby adopts and incorporates herein the responses found in the
8 Opposition to Plaintiffs' Motion for Appeal Bond filed by objectors Drey and Pridham on October
9 29, 2012.

10 **CONCLUSION**

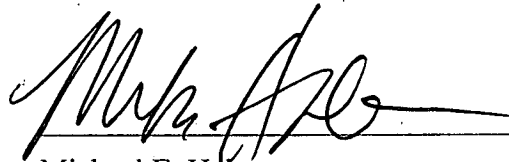
11 There is no basis for the posting of a bond. The appeal is based upon good faith and
12 founded on precedent. The Objector, Michael E. Hale, prays that Class Plaintiffs' motion be denied.

13 **RELIEF**

14 Objector Michael Hale requests the Court to deny the Motion for Appeal Bond.

15
16 November 6, 2012

17 Respectfully submitted,

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CERTIFICATE OF SERVICE


I certify that a true and correct copy of this document has been forward to all those listed below by Federal Express on this the 6th day of November 2012.

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