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*Class Counsel for Plaintiff and the Provisional Class*

[ADDITIONAL COUNSEL ON SIGNATURE PAGE]

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

NEIL TORCZYNER, individually, on  
behalf of himself, and all others similarly  
situated,

Plaintiff,

v.

STAPLES, INC.,

Defendant.

Case No. 16-cv-02965-JM-JLB

**CLASS ACTION**

**NOTICE OF MOTION AND  
MOTION FOR BOND ON  
APPEAL**

Date: Oct. 23, 2017  
Time: 10:00 a.m.  
Judge: Hon. Jeffrey T. Miller  
Courtroom: 5D

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 23, 2017, at 10:00 a.m., at the United States District Court for the Southern District of California, located at 940 Front Street, San Diego, California, Plaintiff will and hereby do move before the Honorable Jeffrey T. Miller, courtroom 5D, for an order from this Court granting Plaintiff’s Motion For Bond On Appeal, and requiring Objector Scott Kron to post an appellate bond of \$50,000.

This Motion For Bond On Appeal (“Motion”) is based on this Notice Of Motion and Motion and the accompanying Memorandum of Points and Authorities In Support Of Motion filed concurrently herewith, as well as the pleadings on file in this action, and upon such other matters, evidence, and arguments as may be presented to the Court before or at the hearing on the Motion.

Dated: September 21, 2017

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**CERTIFICATE OF SERVICE**

I, Frank R. Schirripa, certify that on September 21, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record registered with the CM/ECF system.

Dated: September 21, 2017

**HACH ROSE SCHIRRIPA  
& CHEVERIE LLP**

By: /s/ Frank R. Schirripa  
Frank R. Schirripa

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10 [ADDITIONAL COUNSEL ON SIGNATURE PAGE]

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

13 NEIL TORCZYNER, individually, on  
14 behalf of himself, and all others similarly  
situated,

15 Plaintiff,

16 v.

17 STAPLES, INC.,

18 Defendant.

Case No. 16-cv-02965-JM-JLB

**CLASS ACTION**

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR BOND ON  
APPEAL**

Date: Oct. 23, 2017

Time: 10:00 a.m.

Judge: Hon. Jeffrey T. Miller

Courtroom: 5D

1           **I. INTRODUCTION**

2           On August 28, 2017, after conducting a full fairness hearing, this Court found  
3 that “the settlement is fundamentally fair, reasonable, and adequate, and the fees request  
4 is reasonable and well supported,” and granted final approval of the class action  
5 settlement and attorneys’ fees in this matter pursuant to Federal Rule of Civil Procedure  
6 23(e) and all applicable Ninth Circuit authority. *See* Order granting Plaintiff’s Motions  
7 for Final Approval of Class Settlement and Attorneys’ Fees (“Final Approval Order”),  
8 entered on August 28, 2017 (ECF No. 35). In so ruling, this Court considered and  
9 expressly rejected all objections to the settlement, including the objections asserted by  
10 Scott Kron (“Objector Kron” or “Appellant”). *See id.*, at 10 n.5.

11           The settlement is an excellent result for the Class. Under the settlement, each class  
12 member who submits a timely and valid claim form will receive \$10 in “Settlement  
13 Rewards.” Settlement Rewards are “credit usable for purchases at Staples retail stores  
14 and on Staples.com,” which are subject to the same terms as Rewards certificates  
15 distributed by Staples as part of the Rewards program. Moreover, the Class is recovering  
16 exactly what it claims to have lost: Rewards credits that can be used just as Rewards  
17 certificates could have been used, i.e. for products at Staples retail stores or at  
18 Staples.com without additional expense to class members. *Id.* at 10.

19           Now, one man seeks to withhold all relief to the Class, potentially for a period of  
20 years. The appeal will fail, but not before Class counsel spends thousands of dollars and  
21 countless hours opposing this frivolous appeal. For these reasons, as well as those set  
22 forth below, Plaintiff requests that an appellate bond of \$50,000 should be granted.

23  
24           **II. APPELLANT SHOULD BE REQUIRED TO POST A BOND AS A  
25           CONDITION OF PROSECUTING HIS APPEALS**

26           The purpose of an appellate cost bond is “to protect an appellee against the risk  
27 of nonpayment by an unsuccessful appellant.” *Miletak v. Allstate Ins. Co.*, No. C 06-  
28 03778 JW, 2012 WL 3686785, (N.D. Cal. Aug. 27, 2012), at \*1(quoted *Fleury v.*

1 *Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2008 WL 4680033, at \*6 (N.D. Cal. Oct.  
2 21, 2008)). In class action cases, an appeal bond is “necessary to provide some level of  
3 security to Lead Plaintiffs who have no assurances that Appellants have the ability to  
4 pay the costs and fees associated with opposing their appeals.” *In re Nutella Mktg. &*  
5 *Sales Practices*, CIV. A. No. 11-1086 FLW, 2012 WL 6013276 (D.N.J. Nov. 20, 2012).  
6 The authority to impose a bond and to determine its amount falls squarely within the  
7 district court’s discretion. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028  
8 (9th Cir. 2001); *see also* Fed. R. App. P. 7 (“Rule 7”) (empowering district courts to  
9 “require an appellant to file a bond or provide other security in any form and amount  
10 necessary to ensure payment of costs on appeal.”). This Court retains jurisdiction  
11 “during the pendency of an appeal” to order appeal bonds. *See In re Advanced Elecs.,*  
12 *Inc.*, 283 F. App’x 959, 963 (3rd Cir. 2008) (quoting *Venen v. Sweet*, 758 F.2d 117, 120-  
13 21 (3rd Cir. 1985)). Moreover, “a district court, familiar with the contours of the case  
14 appealed, has the discretion to impose a bond which reflects its determination of the  
15 likely outcome of the appeal.” *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998) (citation  
16 omitted).

17 **A. All Relevant Factors Support Requiring A Bond.**

18 When determining whether a bond should be posted, district courts in the Ninth  
19 Circuit consider: (1) the appellant’s financial ability to post a bond; (2) the risk that the  
20 appellant would not pay the appellees’ costs if the appeal loses; and (3) the merits of  
21 the appeal. *Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007).  
22 Here, all factors weigh in favor of imposing a bond.

23 First, there is nothing to suggest that Mr. Kron and/or his counsel are financially  
24 unable to post the reasonable bond requested.

25 Second, the risk that the appellant would not pay is substantial because the costs  
26 and interest to be owed if the appeal is unsuccessful are significant compared to Mr.  
27 Kron’s individual stake in the litigation.  
28

1 Third, the appeal is meritless. Mr. Kron objected that the (1) Plaintiff's fee  
2 motion was not on the settlement website as of the date he filed his objection; (2)  
3 Plaintiff's fee request is too high "unless class members will actually receive the  
4 maximum amount of \$2 million available in Staples Rewards"; and (3) settlement is  
5 "essentially a coupon settlement and the rules surrounding coupon settlements should  
6 be applied." None of Kron's arguments are persuasive or supported. As this Court  
7 has already found (1) Mr. Kron does not have standing to object to the fee award, (2)  
8 even if Mr. Kron had standing to object to the fee award, Plaintiff's request for an award  
9 based on the maximum settlement amount is proper, and (3) under established Ninth  
10 Circuit precedent, the \$10 Rewards voucher is not a coupon. *See* Final Approval Order,  
11 at 10 n.5 (ECF No. 35). Further, as noted in Plaintiff's Memorandum of Points and  
12 Authorities in Support of Final Approval of Class Action Settlement, filed on August  
13 7, 2017 (ECF No. 31-1), Mr. Kron is a "professional objector" who plainly does not  
14 care about the individual Class members in this case, nor has a problem delaying or  
15 precluding their benefits altogether. The Court ultimately found that none of Mr.  
16 Kron's objections merited rejection of the settlement, a fact which is only further  
17 evidenced by his and/or his attorney's failure to appear at the final fairness hearing held  
18 on August 28, 2017. *See* Final Approval Order, at 10 n.5 (ECF No. 35).

19 The standard of review of a district court's approval of a class action settlement  
20 is for clear abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th  
21 Cir. 2009). Such review is "extremely limited" and the court will "affirm if the district  
22 judge applies the proper legal standard and his findings of fact are not clearly  
23 erroneous." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The  
24 same standards apply with respect to the district court's award of fees and costs to Class  
25 counsel. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002).

26 In addition to lacking any meritorious argument on appeal, Objector Kron lacks  
27 standing to appeal this Court's order awarding attorneys' fees and costs because he will  
28



1 be refunded 100 percent under the settlement and his recovery will not be impacted in  
2 any way by the attorneys' fee award. Article III requires "some actual or threatened  
3 injury as a result of the putatively illegal conduct of the defendant . . . likely to be  
4 redressed by a favorable decision." *Wolford v. Gaekle (In re First Capital Holdings*  
5 *Corp. Fin. Prods. Sec. Litig.)*, 33 F.3d 29, 30 (9th Cir. 1994) (finding that these same  
6 criteria apply in determining the question of standing on appeal). Objectors lack  
7 standing to file a federal appeal unless he can show (i) that he was injured and (ii) how  
8 the injury could "likely be redressed by a favorable decision" by the federal court. *Id.*,  
9 at 30. Indeed, the Ninth Circuit has routinely held that where an objection merely  
10 challenges the fee award but does not show how granting the requested relief would  
11 benefit the objector, then there is no standing to object. *See id.*; *see also Knisley v.*  
12 *Network Assocs., Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002) (finding lack of standing  
13 because objector could not demonstrate how vacating fee award would benefit objector).  
14 Moreover, conjectural allegations that a fee award might be collusive or that reducing it  
15 might have resulted in a better outcome for the objector cannot meet the constitutional  
16 requirement that the injury be "concrete and particularized." *Glasser v. Volkswagen of*  
17 *Am., Inc.*, 645 F.3d 1084, 1089 (9th Cir. 2011).

18 **B. The Amount Requested Is Appropriate.**

19 If an appeal is filed and ultimately unsuccessful, Plaintiffs will be entitled to the  
20 cost of opposing the appeal. Costs identified in Rule 39(e) of the Federal Rules of  
21 Appellate Procedure<sup>1</sup> "are among, but not necessarily the only, costs available on  
22 appeal." *Azizian*, 499 F.3d at 958. In the context of appellate bonds imposed on objectors  
23 to class actions settlements, district courts in this Circuit have found that both post-

24 \_\_\_\_\_  
25 <sup>1</sup> Costs identified include: (1) the preparation and transmission of the record; (2)  
26 reporter's transcripts; (3) premiums paid for a supersedeas bond or other bond to  
27 preserve rights pending appeal; and (4) the fee for filing the notice of appeal. Fed. R.  
28 App. P. 39(e).

1 judgment interest on the cash component of the settlement, as mandated 28 U.S.C.  
2 Section 1961, and administrative costs incurred “to continue to service and respond to  
3 class members needs pending the appeal” may properly be included when calculating  
4 the appropriate amount for an appellate bond. *See Miletak*, 2012 WL 3686785, at \*2  
5 (ordering bond of \$60,000 to cover Rule 39(e) costs and administrative costs); *In re*  
6 *Wal-Mart Wage & Hour Emp’t Practices Litig.*, No. 2:06-cv-00225-PMP-PAL, 2010  
7 WL 786513, at \*1 (D. Nev. Mar. 8, 2010) (ordering each objector to post a \$500,000  
8 bond to cover administrative costs and interest, in addition to costs incurred under Rule  
9 39(e)); *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 WL 6916834, at \*3  
10 (D. Mass. Aug. 22, 2006) (including anticipated interest on cash fund while on appeal  
11 in appellate bond calculation).

12 Rule 7 does not require plaintiffs to make “delineated showing of costs for a bond  
13 motion.” *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 1963063, at  
14 \*3-5 (D.N.J. Jul. 2, 2007). Instead, in ordering appellate bonds, district courts determine  
15 whether the requested amount is sufficient to cover anticipated costs without posing a  
16 substantial financial hardship on the appellant. *See In re Initial Public Offering Sec.*  
17 *Litig.*, 721 F. Supp. 2d 210, 214-17 (S.D. N.Y. 2010). Applying this analysis, district  
18 courts in this Circuit have routinely determined that for Rule 39(e) costs alone requested  
19 amounts between \$5,000 and \$25,000 are appropriate, absent a specific showing of  
20 financial hardship by the objector. *See In re Wachovia Corp. “Pick-A-Payment” Mortg.*  
21 *Mktg. & Sales Practices Litig.*, No. 5:09-md-02015-JF (PSG), 2011 WL 3648508, at \*2  
22 (ordering bond for \$15,000 for Rule 39(e) costs); *Miletak*, 2012 WL 3686785, at \*2  
23 (ordering bond including \$10,000 for Rule 39(e) costs and \$50,000 for administrative  
24 costs); *In re Magsafe Apple Power Adapter Litig.*, 2012 WL 2339721, at \*2 (finding  
25 that a bond of \$25,000 per objector sufficient to cover plaintiffs’ costs on appeal;  
26 reducing amount to \$15,000 in light of substantial hardship showing); *Fleury*, 2008 WL  
27 4680033, at \*6-7 (granting a request for a \$5,000 appellate bond).

1 Other costs that Plaintiff will seek when they prevail on appeal include interest on  
2 the cash fund and administrative costs.

3 A reasonable method for calculating the estimated interest on the \$2 million  
4 Settlement value is to use the current applicable interest rate of 1.30%<sup>2</sup> for 24 months,  
5 which is a conservative estimate of the length of time it will take to resolve a class action  
6 appeal<sup>3</sup>. This calculation yields an estimated interest of \$52,000. Moreover, additional  
7 administrative costs associated with and administrative costs incurred “to continue to  
8 service and respond to class members needs pending the appeal” are anticipated here to  
9 be approximately \$25,000. *See Miletak*, 2012 WL 3686785, at \*2.

10 Thus, while Plaintiff would be justified in seeking bond in excess of \$77,000,  
11 Plaintiff seeks a bond of only \$50,000. This amount is sufficient to cover Plaintiff’s hard  
12 costs associated with the appeal, is supported by all relevant and controlling case law  
13 and should be granted.

### 14 **III. CONCLUSION**

15 For the reasons set forth above, Plaintiff respectfully requests that this Court grant  
16 Plaintiff’s motion requiring Objector Kron to post an appeal bond of \$50,000 or to file  
17 a notice of dismissal of his appeal within seven days of this Court’s order.

18  
19 Dated: September 21, 2017

**HACH ROSE SCHIRRIPA &  
CHEVERIE LLP**

By: /s/ Frank R. Schirripa

22  
23 <sup>2</sup> The applicable interest rate is equal to the “weekly average 1-year constant maturity  
24 Treasury yield, as published by the Board of Governors of the Federal Reserve system,  
25 for the calendar week preceding the date of the judgment.” 28 U.S.C. § 1961. According  
to the Federal Reserve website, for the week ended September 20, 2017, the rate was  
1.30%. *See* <https://fred.stlouisfed.org/series/DGS1>.

26 <sup>3</sup> The Frequently Asked Questions section of the Ninth Circuit’s web site indicates that  
27 decisions on appeals are usually rendered between 15-32 months from when an appeal  
is filed. *See* <http://www.ca9.uscourts.gov/content/faq.php> (Question Nos. 17 and 18).

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**CERTIFICATE OF SERVICE**

I, Frank R. Schirripa, certify that on September 21, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record registered with the CM/ECF system.

Dated: September 21, 2017

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