

1 Neville L. Johnson (SBN 66329)
njohnson@jillplaw.com
2 Douglas L. Johnson (SBN 209216)
djohnson@jillplaw.com
3 Jordanna G. Thigpen (SBN 232642)
jthigpen@jillplaw.com
4 **JOHNSON & JOHNSON, LLP**
439 North Canon Drive, Suite 200
5 Beverly Hills, California 90210
Telephone: (310) 975-1080

6 William Anderson, (*Pro Hac Vice*)
wanderson@cuneolaw.com
7 Charles J. LaDuca, (*Pro Hac Vice*)
charles@cuneolaw.com
8 Michael J. Flannery (SBN 196266)
mflannery@cuneolaw.com
9 **CUNEO GILBERT & LADUCA, LLP**
10 4725 Wisconsin Avenue, NW
Suite 200
11 Washington, DC 20002
Telephone: (202) 789-3960

12 Brian W. Warwick, (*Pro Hac Vice*)
bwarwick@varnellandwarwick.com
13 Janet R. Varnell, (*Pro Hac Vice*)
jvarnell@varnellandwarwick.com
14 **VARNELL & WARWICK, P.A.**
15 P.O. Box 1870
Lady Lake, FL 32158
16 Telephone: (352) 753-8600

17 Attorneys for Plaintiffs and the Proposed Class

18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **WESTERN DIVISION**

21 **AMY FRIEDMAN, JUDI**
22 **MILLER, KRYSTAL HENRY-**
23 **MCARTHUR, and LISA**
ROGERS on behalf of themselves
and all others similarly situated,

24 **Plaintiffs,**

25 **v.**

26 **GUTHY-RENKER LLC and**
27 **WEN BY CHAZ DEAN, INC.,**

28 **Defendants.**

Case No. 2:14-cv-06009-ODW-AGR

MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
APPEAL BOND

Judge: Hon. Otis D. Wright II
Motion Date: November 20, 2017
Time: 1:30 p.m.
Location: Courtroom 5D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. RULE 7-3 CERTIFICATION.....	2
III. BACKGROUND.....	3
IV. ARGUMENT	4
A. Legal Standard For Issuance of an Appeal Bond.....	4
B. Pamela Sweeney Should Be Required to Post a Bond	5
1. Mrs. Sweeney Has Not Demonstrated An Inability To Pay A Bond.....	6
2. There Is A Substantial Risk That Mrs. Sweeney Will Not Pay Costs If Her Appeal Is Unsuccessful.....	7
3. Mrs. Sweeney’s Appeal Is Meritless	7
C. Ellen Bentz Should be Required to Post a Bond	8
1. Ms. Bentz Has Not Demonstrated An Inability To Pay A Bond.....	9
2. There Is A Substantial Risk That Ms. Bentz Will Not Pay Costs If Her Appeal Is Unsuccessful.....	10
3. Ms. Bentz’s Appeal Is Without Merit	10
D. Pamela Behrend Should be Required to Post a Bond.....	11
1. Mrs. Behrend Testified That She Has The Financial Resources To Post A Bond.....	12
2. Mrs. Behrend Poses A Risk Of Nonpayment of Costs	12
3. Mrs. Behrend’s Appeal Has No Merit.....	12
E. Amount of the Bond.....	13
1. Appellate Costs.....	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Settlement Administration Costs 14

V. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Azizian v. Federated Dep’t Stores, Inc.,
499 F. 3d 950 (9th Cir. 2007)..... 4

Dennings v. Clearwire Corp.,
928 F.Supp.2d 1270 (W.D. Wash. 2013)..... 5, 15

Devlin v. Scardelletti,
536 U.S. 1 (2002) 13

Embry v. ACER Am. Corp.,
2012 WL 2055030 (N.D. Cal. 2012)..... 7, 10

Fleury v. Richemont North Amer., Inc.,
2008 WL 4680033 (N.D. Cal. 2008)..... 5

In re Initial Pub. Offering Sec. Litig.,
728 F. Supp. 2d 289 (S.D.N.Y. 2010)..... 6, 9

In re Netflix Privacy Litig.,
2013 WL 6173772 (N.D. Cal. 2013)..... 5

In re Nutella Marketing and Sales Practices Litigation,
589 Fed. Appx. 53 (3d Cir. 2014) 13

Miletak v. Allstate Ins. Co.,
2012 WL 3686785 (N.D. Cal. 2012)..... 4, 5, 15

Redwen v. Sino Clean Energy, Inc.,
2013 WL 12128684 (C.D. Cal. 2013)..... 5

Schulken v. Washington Mut. Bank,
2013 WL 1345716 (N.D. Cal. 2013)..... 7, 10

Shames v. Hertz Corp.,
2013 WL 3155019 (S.D. Cal. 2013) 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Despite the exacting analysis of the Class Action Settlement conducted by this Court, three objectors with questionable motives and equally questionable behavior threaten to substantially delay thousands of Class Member claims, exclusively for personal gain. The meritless and boilerplate arguments raised by the now-Appellants have already been considered and rejected by this Court and do not warrant a protracted delay. These appeals were filed for tactical reasons and are intended to only serve the self-interest of three Class Members who could have opted out to pursue individual claims. Instead, they opted to object to the settlement and appeal in order to leverage the harm to the Class caused by the delay to extort funds from Class Counsel. Although purportedly filed *pro se*, these appeals are being prosecuted by three lawyers hiding in the shadows and evading the reach of this Court. Even though none of the three lawyers hold California bar cards, they are nevertheless actively practicing law in California on behalf of these purportedly *pro se* litigants. There is no doubt that these are professional objectors that have no real interest in having the Settlement scuttled, only in enriching themselves at the cost of the Settlement.

The *Manual for Complex Litigation* distinguishes between *bona fide* objectors and what have become known as “professional objectors” that now confront this Court:

Some objections, however, are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections). An objection, even of little merit, can be costly and significantly delay implementation of a class settlement. Even a weak objection may have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement. Objections

1 may be motivated by self-interest rather than a desire to win significant
2 improvements in the class settlement.

3 *Manual for Complex Litigation, Fourth* § 21.643 (2004).

4 This Court should not countenance this effort to increase litigation costs and
5 hold up tangible relief to Class Members without requiring the Appellants to post
6 an appropriate appeal bond. This Court has, at every turn, held all the litigants to a
7 high standard and attempted to protect the rights of absent Class Members,
8 admonishing Plaintiffs' counsel to work efficiently and effectively for the benefit
9 of the Class. Plaintiffs and the Class respectfully request that the Court require the
10 same of these Appellants. If the Appellants mean to delay relief to this Class, they
11 ought to bear the cost and risk of that delay; those costs should not be borne by the
12 Class. If their appeals have actual merit, Appellants should not fear posting a
13 reasonable bond.

14 Because each Appellant readily meets the established criteria for issuance of
15 an appeal bond, the Parties¹ respectfully request that the Court require that each
16 Appellant post an appeal bond in the amount of \$48,326.50, comprised of: (1)
17 anticipated settlement administration fees of \$42,499.00; and (2) transcript, filing,
18 copy, binding and other reasonable fees associated with litigation of the appeal of
19 \$1,942.50 for each Appellee—a total of \$5,827.50 in hard costs associated with the
20 appeal.

21 **II. Rule 7-3 Certification**

22 Pursuant to Local Rule 7-3, prior to filing this motion, Plaintiffs' counsel
23 met and conferred with each Appellant. Plaintiffs' counsel met and conferred with
24 Pamela Sweeney on October 6, 2017, Mrs. Sweeney indicated she would not agree
25 to post a bond in excess of \$500.

26 After emailing *pro se* Appellant Pamela Behrend and the attorney from her

27 _____
28 ¹ Both Defendants join this motion for purposes of the relief sought, and stated that they anticipated accruing hard costs associated with the appeal consistent with those of Plaintiffs. *See* Section II, *infra*.

1 husband's law firm who represented her in deposition, Plaintiff's counsel received
2 an email from a professional objector attorney named, N. Albert Bacharach, Jr.
3 Mr. Bacharach entered an appearance in the Ninth Circuit on Mrs. Behrend's
4 behalf on October 4, 2017. Plaintiffs' counsel met and conferred with Mr.
5 Bacharach on October 10, 2017. Counsel indicated that Mrs. Behrend would not
6 be willing to post a bond in excess of \$1,000.

7 Plaintiff's counsel also emailed *pro se* Appellant Ellen Bentz and were
8 contacted by the lawyer who wrote Ms. Bentz's objection, defended her
9 deposition, and paid her appellate filing fee, Bryce Lenox. Plaintiffs' counsel met
10 and conferred with Mr. Lenox, on October 10 and October 11, 2017. Mr. Lenox
11 indicated that his firm would be entering an appearance in the Ninth Circuit, but to
12 date that has not occurred. Purported counsel for Ms. Bentz indicated that she
13 would be unwilling to post any bond in any amount.

14 Plaintiffs' counsel also met and conferred with Janelle P. Kilies, counsel for
15 Defendants Guthy-Renker, and Barry Schirm, counsel for WEN by Chaz Dean,
16 Inc. On October 19, 2017, Mrs. Kilies and Mr. Schirm, indicated that their clients
17 join this motion for purposes of the relief sought. *See* Declaration of William
18 Anderson in Support of Motion to Order Appeal Bond ("Anderson Decl.") at ¶¶ 9-
19 10. And, both Ms. Kilies and Mr. Schirm indicated their belief that Defendants are
20 each likely to accrue costs for the appeal consistent with those of Plaintiffs. *Id.*

21 **III. BACKGROUND**

22 The Court is well-acquainted with the history of this litigation. Plaintiffs
23 will recount only the aspects of the procedural history relevant to the instant
24 motion. After more than two years of contentious litigation and intense
25 negotiations, on October 28, 2016, this Court granted preliminary approval to the
26 Class Action Settlement. *See* Docket No. 178. Following notice to the Class,
27 timely objections were filed by, among others, Class Members Pamela Sweeney,
28 Ellen Bentz and Pamela Behrend. *See* Anderson Decl. at Exhibits 1-3. The

1 objections were purportedly *pro se*. *See id.* Before the final approval hearing,
2 Mrs. Sweeney, Ms. Bentz and Mrs. Behrend were each deposed. *See Anderson*
3 *Decl.* at Exhibits 4-6 (deposition transcripts including exhibits to same).

4 On May 1, 2017, Class Counsel filed an unopposed motion for final
5 approval of the Settlement. *See* Docket No. 216. On the same date, Class Counsel
6 also filed a motion seeking attorney’s fees, costs, and incentive awards for the
7 Named Plaintiffs. *See* Docket No. 218.

8 The Court held the final approval hearing on June 5, 2017, and, after
9 receiving additional briefing, the Court signed an order granting final approval to
10 the Settlement, which was entered onto the docket on August 22, 2017. *See*
11 Docket Nos. 250, 251. None of the now-Appellants appeared at the final approval
12 hearing in-person or by phone, individually or through counsel.

13 On September 11, 2017, the Clerk’s office received a notice of appeal from
14 Pamela Sweeney. *See* Docket No. 252. On September 19, 2017, the Clerk’s office
15 received a notice of appeal from Ellen Bentz. *See* Docket No. 256. On September
16 22, 2017, the Clerk’s office received an appeal from Pamela Behrend.² *See* Docket
17 No. 261.

18 **IV. ARGUMENT**

19 **A. LEGAL STANDARD FOR ISSUANCE OF AN APPEAL BOND**

20 “[T]he district court may require an appellant to file a bond or provide other
21 security in any form and amount necessary to ensure payment of costs on appeal.”
22 *See Azizian v. Federated Dep’t Stores, Inc.*, 499 F. 3d 950, 954-55 (9th Cir. 2007)
23 (quoting Fed. R. App. P. 7). “The purpose of an appeal bond is to protect an
24 appellee against the risk of nonpayment by an unsuccessful appellant.” *Miletak v.*
25 *Allstate Ins. Co.*, 2012 WL 3686785, *1 (N.D. Cal. 2012) (original brackets

26 _____
27 ² Plaintiffs’ request for an appeal bond from Mrs. Behrend is without waiver of
28 arguments concerning her standing to appeal or the jurisdiction of the Ninth Circuit
to hear her appeal. *See* Fed. R. App. P. 4. Among other deficiencies, Mrs.
Behrend’s appeal was untimely. *Id.*

1 omitted) (quoting *Fleury v. Richemont North Amer., Inc.*, No. 05-4525, 2008 WL
2 4680033, *6 (N.D. Cal. Oct. 21, 2008)). “[T]he question of the need for a bond, as
3 well as its amount, are left in the discretion of the trial court.” *Fleury*, 2008 WL
4 4680033, *6 (citing Fed. R. App. P. 7, 1979 advisory committee notes).

5 In analyzing the appropriateness of an appeal bond, courts in the Ninth
6 Circuit consider three factors: (1) the appellant’s financial ability to post a bond;
7 (2) the risk that the appellant would not pay the appellee’s costs if the appeal loses;
8 and (3) the merits of the appeal.”” *Shames v. Hertz Corp.*, 2013 WL 3155019, at
9 *1 (S.D. Cal. June 18, 2013) (quoting *Fluery*, 2008 WL 4680033, at *6-7). Each
10 of these factors favors imposing an appeal bond on the present Appellants.
11 Further, the issuance of appeal bonds against objectors in class action cases has
12 become quite common in the Ninth Circuit. *See, e.g., In re Netflix Privacy Litig.*,
13 2013 WL 6173772, *4 (N.D. Cal. Nov. 25, 2013) (assessing bond of \$21,519 from
14 each objector who sought to pursue appeal); *Redwen v. Sino Clean Energy, Inc.*,
15 2013 WL 12128684, *3 (C.D. Cal. December 20, 2013) (imposing appeal bond of
16 \$17,410.50 in \$2 million dollar settlement); *Miletak v. Allstate Ins. Co.*, 2012 WL
17 3686785, *2 (N.D. Cal. Aug. 27, 2012) (imposing an appeal bond of \$60,000);
18 *Dennings v. Clearwire Corp.*, 928 F.Supp.2d 1270, 1272 (W.D. Wash. 2013)
19 (imposing an appeal bond of \$41,150). Each Objector meets all three criteria for
20 requiring an appeal bond.

21 **B. PAMELA SWEENEY SHOULD BE REQUIRED TO POST A**
22 **BOND**

23 Pamela Sweeney is a *pro se* serial objector whose husband is a Wisconsin
24 lawyer and law school classmate of Darrell Palmer, a notorious serial objector and
25 disbarred California attorney. *See* Anderson Decl. Exhibit 4 at Pg. 53, Lns. 18-25.
26 By her own account, Mrs. Sweeney was previously represented by her husband,
27 and in an appeal by Darrell Palmer, when she filed her first couple of objections
28 three years ago, but now objecting is her “deal”. *See* Anderson Decl. Exhibit 4 at

1 Pg. 18, Ln. 7. At the time of her deposition on April 10, 2017, Mrs. Sweeney had
2 filed objections to nine class action settlements, including five in 2016 alone. *See*
3 Anderson Decl. Exhibit 4 at Pg. 16, Lns. 15-18; Pg. 50, Lns. 9-11.

4 To the best of her recollection, Mrs. Sweeney filed appeals in six of the nine
5 cases she objected in. *See* Anderson Decl. Exhibit 4 at Pg. 23, Lns. 18-21. That
6 number has increased to seven with the filing of her appeal in the instant case.
7 Yet, counsel was unable to find a single case in which Mrs. Sweeney appeared *pro*
8 *se* and actually filed an appeal brief after filing a notice of appeal. Mrs. Sweeney
9 has had at least one appeal dismissed for failure to post an appeal bond. *See*
10 Anderson Decl. Exhibit 4 at Pgs. 47-48, Lns. 17-3. And in the instant case, a show
11 cause order is pending from the Ninth Circuit because Mrs. Sweeney has not even
12 paid the fee to pursue her appeal. *See* Docket No. 259. Mrs. Sweeney's
13 motivations are clear. While she acknowledges settling three of her objector
14 appeals, she refused to disclose which cases and whether she accepted money in
15 exchange for the dismissals. *See* Anderson Decl. Exhibit 4 at Pg. 21, Lns. 2-24.

16 In short, Pamela Sweeney meets all the criteria for issuance of a bond.

17 **1. Mrs. Sweeney Has Not Demonstrated An Inability To Pay A**
18 **Bond**

19 First, to the extent Mrs. Sweeney may claim that she cannot post a bond, it is
20 Mrs. Sweeney's burden to establish that she lacks the financial capacity to do so.
21 *Miletak*, 2012 WL 3686785, at *2 (absence of evidence that the objector is unable
22 to bond "weighs in favor of imposing an appeal bond"); *see also In re Initial Pub.*
23 *Offering Sec. Litig.*, 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (ability to post
24 bond is "presumed" where objectors do not present evidence to the contrary).
25 "[F]inancial information" is required; a mere assertion as to financial inability in a
26 declaration, without more, is insufficient and "weighs in favor of imposing a
27 bond." *Miletak*, 2012 WL 3686785, at *2, n.4. And, if indeed, Mrs. Sweeney
28 claims that she cannot afford to pay a bond she should be required to provide

1 detailed financial information, including her husband’s income derived from his
2 legal practice, as well as all the income Mrs. Sweeney has earned—including any
3 income derived from her agreement to dismiss class action appeals or objections
4 on behalf of herself or her children.

5 **2. There Is A Substantial Risk That Mrs. Sweeney Will Not Pay**
6 **Costs If Her Appeal Is Unsuccessful**

7 The fact that Mrs. Sweeney is an out-of-state resident alone is a factor
8 supporting issuance of an appeal bond. *See Schulken v. Washington Mut. Bank*,
9 2013 WL 1345716, at *5 (N.D. Cal. April 2, 2013) (“Courts in the Northern
10 District of California have recognized the difficulty and risk associated with
11 collecting costs from out-of-state appellants.”); *see also Embry v. ACER Am.*
12 *Corp.*, 2012 WL 2055030, at *1 (N.D. Cal. June 5, 2012). When her out-of-state
13 residency is coupled with her failure to pay an appeal bond in at least one prior
14 class action appeal, and her failure to pay even the filing fee in this case, the scale
15 tips heavily in favor of an appeal bond in this case.

16 **3. Mrs. Sweeney’s Appeal Is Meritless**

17 The merits of an appeal must also be considered in conjunction with a
18 court’s decision to issue an appeal bond. *See, e.g., Miletak*, 2012 WL 3686785, at
19 *2 (Court found appeal to be “meritless” and ordered appellant to post a bond of
20 \$60,000). In the final approval order the Court twice noted that the grounds for
21 Mrs. Sweeney’s appeal were “vague.” *See* Docket No. 250 at Pg. 16, Lns. 6-11.
22 The vagueness of Mrs. Sweeney’s objection is unsurprising given that she makes
23 many of the same stock arguments in nearly every objection she files. *See*
24 Anderson Decl. Exhibit 4 (Exhibits 2-9 to deposition transcript). Although her
25 objection asserts that the Settlement amounts are insufficient, she fails to explain
26 why. She also fails to explain what amount would be sufficient. If she had a valid
27 claim against these Defendants, she could have opted out and pursued her claim for
28 individual damages. However, her background, and even a cursory review of the

1 objection, shows that it was filed in order to create standing for an appeal so that
2 the delay caused by the appeal and concomitant harm to the Class could be used as
3 leverage to extort money from Class Counsel. Since her appeal is plainly without
4 specificity or merit, this factor also supports issuance of a bond.

5 **C. ELLEN BENTZ SHOULD BE REQUIRED TO POST A BOND**

6 Ellen Bentz is also an alleged *pro se* objector. However, in Ms. Bentz’s case
7 she is not the driving force behind her objection, a lawyer to whom she owes
8 money is. In her deposition, Ms. Bentz explained:

9 Q. Do you have a fee agreement in this case?

10 A. No.

11 Q. Do you have an understanding as to how you will compensate Mr.
12 Lenox if your objection is successful?

13 A. We have not – we have not discussed particulars of anything, no.

14 Q. So you have had no discussion with your counsel about how he’ll
15 be compensated for work in this case?

16 A. No, none.

17 Q. Does that concern you at all?

18 A. No, I owe him money from the previous case that I’m – that I owe
19 him, from the one that he helped my sister and I with.

20 *See* Anderson Declaration Exhibit 5 at Pgs. 123-124, Lns. 20-7.

21 Her notice of appeal makes as much clear—although Ms. Bentz purportedly
22 filed the objection *pro se*, her filing fee was paid by her lawyer. *See* Docket Nos.
23 254-255. During the deposition, it was clear that Ms. Bentz lacked even a basic
24 understanding of what a class action is and was completely unaware of the
25 potential impact of her objection: “Q. What do you understand to be the result if
26 your objection is successful? A. I don’t know. I have absolutely no idea...” *See*
27 Anderson Declaration Exhibit 5 Pgs. 155-156, Lns. 25-3. Ms. Bentz did not even
28 know whether she had filed a claim under the Settlement that she was objecting to.

1 (“Q. Have you filed a claim with the settlement administrator? A. I don’t know. I
2 have no idea if Mr. Lenox filed a claim or not. Q. Do you plan to file a claim? A. I
3 don’t know. We have not discussed that. I have no idea. Am I allowed to ask him
4 now? Q. No, but perhaps after the deposition you might ask. A. Okay. I don’t
5 know. Q. But to your knowledge you haven’t filed a claim in the lawsuit then? A.
6 No, sir. I haven’t signed anything. Would that be something I would sign?”). *See*
7 *id.* at Pgs. 161-162, Lns. 13-3.

8 Despite the fact that the deposition occurred well before the deadline for
9 submission of claims, Ms. Bentz and her lawyer, who now seek to delay relief to
10 more than 400,000 Class Members indefinitely, did not even bother to file a claim.

11 As set forth below, Ms. Bentz readily meets the criteria for issuance of an
12 appeal bond.

13 **1. Ms. Bentz Has Not Demonstrated An Inability To Pay A**
14 **Bond**

15 Ms. Bentz testified that she lives on a trust fund. *See* Anderson Declaration
16 at Exhibit 5, Pg. 126, Lns. 12-14. (“Q. And what is your source of income now?
17 A. It’s a trust from my father.”). Accordingly, Ms. Bentz should be readily able to
18 post a bond for this appeal. To the extent Ms. Bentz claims that she cannot post a
19 bond, it is Ms. Bentz’s burden to establish that she lacks the financial capacity to
20 do so. *Miletak*, 2012 WL 3686785, at *2 (absence of evidence that the objector is
21 unable to bond “weighs in favor of imposing an appeal bond”); *see also In re*
22 *Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (ability
23 to post bond is “presumed” where objectors do not present evidence to the
24 contrary). “[F]inancial information” is required; a mere assertion as to financial
25 inability in a declaration, without more, is insufficient and “weighs in favor of
26 imposing a bond.” *Miletak*, 2012 WL 3686785, at *2, n.4. Certainly, her lawyer
27 has the ability to post the bond since he also paid the cost of her appeal. *See*
28 Docket No. 254.

1 **2. There Is A Substantial Risk That Ms. Bentz Will Not Pay**
2 **Costs If Her Appeal Is Unsuccessful**

3 The fact that Ms. Bentz is an out-of-state resident alone is a factor
4 supporting issuance of an appeal bond. *See Schulken v. Washington Mut. Bank*,
5 2013 WL 1345716, at *5 (N.D. Cal. April 2, 2013) (“Courts in the Northern
6 District of California have recognized the difficulty and risk associated with
7 collecting costs from out-of-state appellants.”); *see also Embry v. ACER Am.*
8 *Corp.*, 2012 WL 2055030, at *1 (N.D. Cal. June 5, 2012).

9 Additionally, despite her *pro se* status, communications with Ms. Bentz have
10 only occurred through her purported counsel. *See Anderson Decl.* at ¶ 11. Given
11 that her attorney paid the appeal fee, wrote the objection, and undoubtedly drafted
12 the notice of appeal, but yet has not filed an appearance, nor bothered to file a
13 claim on Ms. Bentz’s behalf, there is a reasonable likelihood that if Ms. Bentz’s
14 appeal is unsuccessful she will not take responsibility for the payment of costs.
15 Since her attorney has yet to file an appearance and has had everything filed *pro se*
16 despite his obvious involvement, he would not be liable for costs for this frivolous
17 appeal either. In fact, this could likely be the basis for his not filing an appearance.

18 **3. Ms. Bentz’s Appeal Is Without Merit**

19 Each of the arguments raised by Ms. Bentz’s ghostwriting attorney were
20 considered and rejected by the Court at final approval. *See Docket No. 250* at Pg.
21 17, Lns. 7-18. And despite the fact that the objection was written by an attorney,
22 there is not a single rule or case cited. *See Anderson Decl.* at Exhibit 5, Pg. 182,
23 Lns. 3-6 (“Q. So the words in your objection, did you write any of the sentences in
24 this objection. A. Personally write, no....”). Ms. Bentz’s lawyer did not attend the
25 final approval hearing or file any document subsequent to the objection save the
26 notice of appeal. Instead, it appears he sent in a three-page letter as a placeholder
27 for the appeal he is now funding and pursuing in an effort to secure a personal
28 payment to pay his fee from a prior case. Under these circumstances, it is clear the

1 appeal lacks merit and the Court ought to require a bond. *See, e.g., Miletak*, 2012
2 WL 3686785, at *2 (court found appeal to be “meritless” and ordered appellant to
3 post a bond of \$60,000).

4 **D. PAMELA BEHREND SHOULD BE REQUIRED TO POST A**
5 **BOND**

6 Pamela Behrend also filed her objection as *pro se*, but that assertion is
7 untrue. Mrs. Behrend’s husband, Kenneth Behrend, is a named partner in a
8 Pittsburgh law firm. No direct communication occurred with Mrs. Behrend except
9 at her deposition—all communication with Mrs. Behrend has gone through her
10 lawyers, despite no appearance having been filed in the District Court by any of
11 them. Anderson Decl. at ¶ 12.

12 Mr. Behrend’s firm provided a lawyer to defend her deposition, and Mrs.
13 Behrend listed that same lawyer from her husband’s firm as the point of contact on
14 her Tier 2 Claim Form. *Id.* at ¶ 12. Mr. and Mrs. Behrend are experienced
15 objectors, having both objected to a class settlement concerning American Home
16 Shield just a few years ago. *See* Anderson Decl. at Exhibit 6, Pgs. 12-13, Lns. 23-
17 2.

18 After filing her notice of appeal, Mrs. Behrend retained a lawyer who is a
19 well-known professional class action objector —N. Albert Bacharach, Jr.—to
20 pursue a payment for her (and himself) in this litigation. While Mrs. Behrend’s
21 objection focused exclusively on statutory minimum damages under Tier 1, Mrs.
22 Behrend actually filed a Tier 2 claim. Thus, she lacks standing to even raise the
23 Tier 1 relief complained of in her *pro se* objection. *See* Anderson Decl. at Exhibit
24 6, Pg. 57, Lns. 13-17 (“A. Okay. And if you were – what is your goal with filing
25 the objection? A. I would like the people in Pennsylvania to get their minimum. Q.
26 Okay. Any other goals? That’s it.”). Because she has the financial resources to
27 pay a bond, is an out-of-state objector, and her appeal lacks merit, Mrs. Behrend
28 plainly meets the criteria for issuance of a bond.

1 **1. Mrs. Behrend Testified That She Has The Financial**
2 **Resources To Post A Bond**

3 In deposition, Mrs. Behrend was asked whether she has the financial
4 resources to post and bond and she stated that she does. *See* Anderson Decl. at
5 Exhibit 6, Pgs. 70-71, Lns. 24-13 (Q. Do you and your husband have the financial
6 ability to post a bond, what is called an appeal bond, which would be, probably
7 covers the cost of keeping all the accounts open and available during the time
8 period of the appeal. And so sometimes the court will require an appeal bond.
9 Have you talked to your husband about that? A. A little bit. Q. Okay. A. And we
10 have a lot of equity in our house. We have plenty of equity in that. We have a
11 good retirement plan we can borrow against. Q. So you have the financial ability?
12 A. Yes.”). Thus, this factor supports the assessment of a bond. *See In re Netflix*,
13 2013 WL 6173772, at *3 (“Generally, district courts have found that this first
14 factor weighs in favor of a bond unless a party is financially unable to post a
15 bond.”) (internal citations omitted).

16 **2. Mrs. Behrend Poses A Risk Of Nonpayment of Costs**

17 Mrs. Behrend is a resident of Wexford, Pennsylvania. *See* Anderson Decl.
18 at Exhibit 6, Pg. 8, Lns. 18-19. Courts in the Ninth Circuit have held that out of
19 state objectors, such as Mrs. Behrend, pose a greater risk of non-payment of costs.
20 *See Redwen*, 2013 WL 12128684, at *2 (“Courts have found that imposition of a
21 bond is favored when, like here, most or all of the objectors are outside of the
22 District.”) (internal citations omitted). Thus, the risk of non-payment factor also
23 favors imposition of a bond for Mrs. Behrend.

24 **3. Mrs. Behrend’s Appeal Has No Merit**

25 Finally, Mrs. Behrend’s appeal lacks any merit. Mrs. Behrend raised two
26 arguments in her objection. First, Mrs. Behrend stated that residents of states with
27 statutory minimum damages, like Pennsylvania, ought not be limited to \$25 under
28 Tier 1. *See* Anderson Decl. at Ex. 3. Second, Mrs. Behrend argued that the

1 attorney's fees were too high and it adversely impacts Tier 1 claimants. *Id.*

2 Mrs. Behrend's first argument—that a compromise in a class action reached
3 before a verdict in a jury or bench trial—must meet every state's minimum damage
4 amount is specious. Putting aside for a moment the California choice of law
5 provision in Defendant's terms and conditions, there is no *per se* rule that every
6 settlement must meet any statutory minimum under Pennsylvania's consumer
7 protection statute, or any other state's, for that matter. *See, e.g., In re Nutella*
8 *Marketing and Sales Practices Litigation*, 589 Fed. Appx. 53 (3d. Cir. 2014)
9 (upholding national settlement of consumer claims including a refund of \$4.00 per
10 jar of Nutella purchased up to a maximum of \$20.00 per consumer). What is more,
11 Mrs. Behrend's standing is limited to advancing her own interests, not those of
12 other class members. In *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002), the Supreme
13 Court held that non-named class members objecting to the approval of a settlement
14 may appeal, but the Court noted that such an objector “will only be allowed to
15 appeal that aspect of the District Court's order that affects him.”

16 Because Mrs. Behrend, did not even file a Tier 1 claim, she lacks standing to
17 advance arguments concerning Tier 1 claimants—the only arguments advanced in
18 her objection. As to Mrs. Behrend's claim that the attorney's fees are excessive,
19 the original fee request was voluntarily reduced by \$1 million at the urging of the
20 Court. The fee approved by the Court amounts to 20.7% of the common fund in
21 this case, well below the 25% threshold considered a benchmark in the Ninth
22 Circuit. As a result, neither of the two arguments advanced by Mrs. Behrend in her
23 objection have merit. Thus, factor three also supports imposition of a bond.

24 **E. AMOUNT OF THE BOND**

25 **1. Appellate Costs**

26 The Ninth Circuit has held that Rule 7 costs on appeal include those
27 identified in Federal Rule of Appellate Procedure 39(e), which include preparation
28 of the record, reporter's transcripts, and filing fees. *See Azizian*, 499 F.3d at 958

1 (“[w]e read this language to mean that the costs identified in Rule 39(e) are among,
2 but not necessarily the only, costs available on appeal.”). Plaintiffs secured a quote
3 from Gibson Moore Appellate Services, LLC, and appellate costs for preparing and
4 filing briefs and appendices and other associated fees were estimated to be
5 \$1,942.50. Anderson Decl. at ¶ 8. Defendants Guthy-Renker and Wen by Chaz
6 Dean have indicated that they anticipate accruing similar costs. *Id.* at ¶¶ 9-10.

7 These amounts are consistent with amounts awarded in similar cases. On
8 the lower end, the Court in *Dennings*, found \$2,000 to be a reasonable amount for
9 the cost of acquiring a transcript and filing documents with the appellate court. *See*
10 *Dennings*, 928 F.Supp.2d at 1272. On the more expensive end of the spectrum, in
11 *Miletak* the court found that \$10,000 was the appropriate amount for the portion of
12 the bond covering Appellee’s costs on appeal. 2012 WL 3686785, at *2.

13 Plaintiffs respectfully request that the Appellants each be required to post a
14 bond for appellate costs in the amount of \$5,827.50 in addition to the component
15 of the bond requested to account for increased settlement administration costs.

16 2. Settlement Administration Costs

17 As set forth in the Declaration of Nancy Baker, submitted
18 contemporaneously herewith, the Settlement Administrator continues to receive a
19 substantial number of communications from Class Members by phone and email.
20 Responding to these communications is time-consuming and costly. It cannot be
21 gainsaid that these Appellants will substantially increase administrative costs for
22 this Settlement. Several factors make the administrative costs of this Settlement
23 higher than many settlements. First, the Class is large with over 8,000,000
24 individuals receiving direct notice. Second, this case involves hair loss, a very
25 emotional issue for those involved. Third, the Tier 2 claimants stand to receive, in
26 some cases, substantial sums of money, increasing engagement. At present, the
27 Settlement Administrator is receiving approximately 100 calls per day with nearly
28 40% of those requesting a return call, and nearly 30 emails today. Because of the

1 nature of the claims, the calls with Class Members are not very short. The time
2 expenditure for these communications alone is costly—roughly \$8,500 per month.
3 *See* Baker Declaration at ¶ 7. Even if one presumes that the communication rate
4 will drop to one-third of its present rate during the appeal, the monthly costs are
5 still likely to exceed \$2,833.00 per month. *Id.* at ¶ 9.

6 According to the Frequently Asked Questions page on the Ninth Circuit
7 website the time from notice of appeal until oral argument is “approximately 12-20
8 months from the notice of appeal date” and the time from argument to decision is
9 typically “3 months to a year.” *See* <https://www.ca9.uscourts.gov/content/faq.php>
10 (last checked October 11, 2017). Thus, ignoring the costs of website maintenance,
11 and assuming that this appeal runs on the shortest time table, the administrative
12 costs of the delay occasioned by these appeals will be approximately \$42,499
13 (\$8,500 per month / 3 * 15 months). *See* Baker Declaration at ¶¶ 9-10. Thus,
14 Plaintiffs request that Appellants be required to post a bond of \$42,499 each for
15 administrative costs.

16 These amounts are consistent with prior appeal bonds required in the 9th
17 Circuit. *See Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, *2 (N.D. Cal. Aug.
18 27, 2012) (imposing an appeal bond of \$60,000, with \$50,000 accounting for
19 increased administrative costs); *Dennings v. Clearwire Corp.*, 928 F.Supp.2d 1270,
20 1272 (W.D. Wash. 2013) (imposing an appeal bond of \$41,150, with \$39,150 of
21 the bond allocated to increased administrative costs).

22 **V. CONCLUSION**

23 As the above analysis and supporting documents demonstrate, issuance of an
24 appeal bond is entirely appropriate as to these Appellants. Therefore, Plaintiffs
25 respectfully request that this Honorable Court grant this Motion and require each
26 Appellant to post a bond in the total amount of \$48,326.50 (comprised of \$5,827.50
27 in appellate costs and \$42,499 in administrative costs).

28

1 DATED: October 20, 2017

JOHNSON & JOHNSON

2 **By:** s/ Jordanna G. Thigpen

3 Neville L. Johnson (SBN 66329)
4 njohnson@jllplaw.com
5 Douglas L. Johnson (SBN 209216)
6 djohnson@jllplaw.com
7 Jordanna G. Thigpen (SBN 232642)
8 jthigpen@jllplaw.com
9 439 North Canon Drive, Suite 200
10 Beverly Hills, California 90210
11 Telephone: (310) 975-1080
12 Facsimile: (310) 975-1095

CUNEO GILBERT & LADUCA, LLP

11 **By:** /s/ William H. Anderson

12 William H. Anderson (*Pro Hac Vice*)
13 wanderson@cuneolaw.com
14 Charles J. LaDuca (*Pro Hac Vice*)
15 charlesl@cuneolaw.com
16 Michael Flannery (SBN 196266)
17 mflannery@cuneolaw.com
18 4725 Wisconsin Ave., NW
19 Suite 200
20 Washington, DC 20002
21 Telephone: (202) 789-3960
22 Fax: (202) 789-1813

VARNELL & WARWICK, P.A.

21 **By:** /s/ Brian W. Warwick

22 Brian W. Warwick (*Pro Hac Vice*)
23 bwarwick@varnellandwarwick.com
24 Janet R. Varnell (*Pro Hac Vice*)
25 jvarnell@varnellandwarwick.com
26 P.O. Box 1870
27 Lady Lake, FL 32158
28 Telephone: (352) 753-8600
Facsimile: (352) 753-8606

Counsel for Named Plaintiffs and the Class

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION RE: SIGNATURES

I, Jordanna G. Thigpen, am the ECF User who is filing Plaintiffs' Joint Declaration of Interim Lead Counsel In Support of Motion for Preliminary Approval. I attest that all signatories listed, and on whose behalf the filings are being submitted, concur in the content of such filings and have authorized the filing of such documents.

DATED: 10/20/17

JOHNSON & JOHNSON LLP

/s/ Jordanna G. Thigpen
Neville L. Johnson (Bar No. 66329)
njohnson@jllplaw.com
Douglas L. Johnson (Bar No. 209216)
djohnson@jllplaw.com
Jordanna G. Thigpen (Bar No. 232642)
jthigpen@jllplaw.com
JOHNSON & JOHNSON LLP
439 North Canon Drive, Suite 200
Beverly Hills, California 90210
Telephone: 310.975.1080
Facsimile: 310.975.1095