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

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

24 **Plaintiffs,**

25 **v.**

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

27 **Defendants.**
28

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

REPLY MEMORANDUM OF LAW IN
FURTHER 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

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Miletak v. Allstate Ins. Co., No. C 06-03778 JW, 2012 WL 3686785 (N.D. Cal. Aug. 27, 2012) 2, 3, 5

Redwen v. Sino Clean Energy, Inc., No. CV 11-3936 PA (SSX), 2013 WL 12128684 (C.D. Cal. Dec. 20, 2013)..... 2, 4

Shames v. Hertz Corp., 2013 WL 3155019 (S.D. Cal. 2013) 1

1 **I. INTRODUCTION**

2 Pamela Behrend is the only Appellant-Objector that filed an opposition to
3 Plaintiff's Motion seeking an appeal bond. Consistent with an emerging pattern¹,
4 Appellant-Objectors Sweeney and Bentz did not file timely oppositions—tacitly
5 conceding that issuance of the requested bond is appropriate. Appellant-Objector
6 Behrend's opposition, while timely, nevertheless ignores most of the arguments
7 raised by Plaintiffs and fails to distinguish any of the cases cited by Plaintiffs.
8 Simply put, her opposition is without merit and a bond should be required of each
9 Appellant-Objector.

10 Plaintiffs' motion establishes that (1) Appellant-Objector Behrend (as well
11 as Appellant-Objectors Sweeney and Bentz) is financially able to post a bond, (2)
12 the risk is substantial that absent the bond Appellant-Objector Behrend will not pay
13 Plaintiffs' costs if she loses her appeal, and (3) the underlying merits of her appeal
14 are lacking. *See Shames v. Hertz Corp.*, 2013 WL 3155019, at *1 (S.D. Cal. June
15 18, 2013) (discussing factors courts should consider in assessing the propriety and
16 amount of a bond). Appellant-Objector does not even contest that there is a risk
17 she will not pay the costs, nor that her appeal lacks merit. Instead, despite an
18 express statement under oath in her deposition that she was willing to and could
19 afford to post a bond, her newest lawyer claims—without any documentary
20 evidence or support—that she cannot afford to post a bond. Additionally,
21 Appellant-Objector argues, in the face of multiple cases to the contrary, that
22 administrative costs cannot be included in the bond. Because Plaintiffs have
23 established that each Appellant-Objector meets the established criteria for an

24 _____
25 ¹ To the extent the improper purpose of these appeals is not already abundantly
26 clear, none of the Appellant-Objectors have complied with their obligations to
27 order transcripts pursuant to Ninth Circuit Rule 10-3.1. As such, all of the appeals
28 are now subject to dismissal pursuant to Ninth Circuit Rule 42-1. *See* Docket Nos.
253, 258, and 262. Additionally, Appellant-Objector Sweeney has also failed to
pay the filing fee for her appeal, ignoring a September 22, 2017 order of the Ninth
Circuit giving her 21 days to submit payment or move to proceed in forma
pauperis. *See* Docket No. 259.

1 appeal bond, each Appellant-Objector should, accordingly, be ordered to post an
2 appeal bond in the amount of \$48,326.50, comprised of: (1) anticipated settlement
3 administration fees of \$42,499.00; and (2) transcript, filing, copy, binding and
4 other reasonable fees associated with litigation of the appeal of \$1,942.50 for each
5 Appellee—a total of \$5,827.50 in hard costs associated with the appeal.

6 **II. ARGUMENT**

7 **A. Costs Of Administration Should Be Included In The Bond**

8 The bulk of Appellant-Objector Behrend’s Opposition is devoted to the
9 argument that administration costs may not be included in the Court’s calculation
10 of the appeal bond. However, the position that Behrend espouses—that the bond
11 can only include appellate costs—ignores numerous cases within the Ninth Circuit
12 interpreting Federal Rule of Appellate Procedure 7 to include administration costs
13 in the amount of the bond. *See e.g. In re Netflix Privacy Litig.*, No. 5:11-CV-
14 00379-EJD, 2013 WL 6173772, at *4 (N.D. Cal. Nov. 25, 2013); *Redwen v. Sino*
15 *Clean Energy, Inc.*, No. CV 11-3936 PA (SSX), 2013 WL 12128684, at *2 (C.D.
16 Cal. Dec. 20, 2013); *Miletak v. Allstate Ins. Co.*, No. C 06-03778 JW, 2012 WL
17 3686785, at *2 (N.D. Cal. Aug. 27, 2012); *Dennings v. Clearwire Corp.*, 928 F.
18 Supp. 2d 1270, 1272 (W.D. Wash. 2013).

19 In *In re Netflix Privacy Litig.*, 2013 WL 6173772, at *4, the plaintiffs asked
20 for appeal bonds of \$21,519 from each individual objector, consisting of \$175 in
21 taxable costs and \$21,344 in administrative costs (including maintaining and
22 administering the settlement website and toll-free phone number, answering
23 questions from class members, managing and filing taxes for the settlement and
24 escrow account, and paying monthly storage costs) for each appeal. The Court held
25 that these costs were reasonable and that requiring an appeal bond totaling \$21,519
26 from each of the individual objectors was proper.

27
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1 In *Redwen*, 2013 WL 12128684, at *2, the Court found that expected
2 administration costs of \$16,510.50 were reasonable:

3 These costs are attributable to the delay caused by Vincent's appeal.
4 The claims administrator has estimated, based on previous experience,
5 that if the appeal further extends the time period of the settlement
6 administration, the additional fees and expenses will be approximately
7 \$1,485.00 per month... The median length of appeals in the Ninth
8 Circuit is 15.3 months... Since the Notice of Appeal was filed on
9 August 9, 2013, and the distribution of the settlement fund is scheduled
10 for January 2014 without accounting for Vincent's appeal, applying the
11 average delay period would extend the time to distribution
12 approximately 10.3 months. Multiplying the average expense of
\$1,485.00 per month by 10.3 months and adding the claims
administrator's estimated one-time fixed fee of \$1,215.00 results in
expected additional administration costs of \$16,510.50. Vincent
presents no evidence to rebut this.

13 In light of the evidence presented, the Court held that the amount of the appeal
14 bond requested by the plaintiffs, which also included \$900 in estimated costs of
15 preparing and filing the record and briefs and the costs of transcripts, was
16 reasonable.

17 In *Miletak*, 2012 WL 3686785, at *2, the Court found that a bond consisting
18 of \$10,000 in appellate costs as defined by Fed. R. App. P. 39(e) and \$50,000 in
19 administrative costs consisting of costs incurred to service and respond to class
20 member needs pending appeal, was reasonable.

21 Finally, in *Dennings*, 928 F. Supp. 2d 1270, 1272, the Court held that the
22 plaintiffs' request for a \$41,150.00 appeal bond was reasonable.

23 Their request includes \$2,000.00 for the cost of acquiring a transcript
24 and filing documents with the court and \$39,150.00 in increased costs
25 of administering the settlement as a result of the appeal... With regard
26 to the \$2,000.00 request, Plaintiffs have produced testimonial evidence
27 that, in the past, this figure would have been much higher but that
28 \$2,000.00 is now reasonable in light of recent rule changes in the Ninth
Circuit that reduce the number of papers that need to be filed on

1 appeal... Mr. Morgan and Mr. De La Garza present no evidence to
2 rebut this. Having reviewed the evidence submitted by Plaintiffs, the
3 court concludes that \$2,000.00 is reasonable. Plaintiffs' request for
4 \$39,150.00 in administrative fees is also reasonable. As explained
5 above, courts have interpreted Rule 7 broadly to include increased
6 expenses in settlement administration and administrative costs...
7 Plaintiffs calculated their figure of \$39,150.00 by multiplying the
8 estimated monthly increase in settlement administration costs
9 (\$2,250.00) by the median length of a Ninth Circuit appeal (17.4
10 months) to arrive at a total of \$39,150.00... This is a sound
11 methodology that is supported by evidence... Once again, Mr. Morgan
12 and Mr. De La Garza present no evidence whatsoever to rebut it.
13 Accordingly, the court concludes that Plaintiffs' figures are reasonable.

14 Appellant-Objector Behrend relies on the Ninth Circuit's decision in *Azizian*
15 *v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 954–55 (9th Cir.2007) for the
16 proposition that administration costs and expenses cannot be included in the bond.
17 But that is not what *Azizian* dictates. In *Azizian*, the Ninth Circuit held “that the
18 term ‘costs on appeal’ in Rule 7 includes all expenses defined as ‘costs’ by an
19 applicable fee-shifting statute, including attorney's fees.” *Azizian*, 499 F.3d at 958.
20 In contrast where, as here, Plaintiff seeks a bond for litigation and settlement
21 administration costs (rather than delay damages or attorneys’ fees), the bond
22 requested is permissible and justified. *See e.g. In re Netflix Privacy Litig.*, 2013
23 WL 6173772, at *4; *Redwen*, 2013 WL 12128684, at *2.

24 Plaintiffs request that Appellant-Objectors be required to post a bond of
25 \$42,499 each for administrative costs is, thus, consistent with prior appeal bonds
26 required in the Ninth Circuit and remains uncontradicted by the record evidence.
27 If these costs are not recovered, Class Member benefits will have to be reduced
28 because the common fund will have to be taxed for these additional expenses
during the appeal.

1 **B. The Estimated Appellate Costs Are Reasonable**

2 With respect to costs on appeal, Appellant-Objector Behrend asserts that the
3 total estimated costs are three times Plaintiffs’ costs. Opp. Mot. App. Bnd., Dkt.
4 No. 270, at 6. Plaintiffs secured a quote from Gibson Moore Appellate Services,
5 LLC, and appellate costs for preparing and filing briefs and appendices and other
6 associated fees were estimated to be \$1,942.50. Anderson Decl. at ¶ 8.
7 Defendants Guthy-Renker and Wen by Chaz Dean have both indicated that they
8 anticipate accruing similar costs. *Id.* at ¶¶ 9-10. Appellant-Objector Behrend
9 makes no legitimate effort to contest these projected costs, pointing only to vague
10 dicta from an unrelated case. Opp. Mot. App. Bnd., Dkt. No. 270, at 2. Thus, the
11 total costs among the Plaintiffs and Defendants amounts to \$5,827.50. The sum of
12 the Parties’ estimated appeal costs should be part of the bond.

13 **C. Appellant-Objector Is Able To Pay The Amount Of The Bond**

14 Appellant-Objector also contends that the amount of the bond is “in excess
15 of an amount affordable” to her. Opp. Mot. App. Bnd., Dkt. No. 270, at 6. This
16 position is, however, contrary to the record evidence. As set forth in Plaintiff’s
17 Opening Brief, Appellant-Objector Behrend testified that she has the financial
18 resources to post a bond. *See* Anderson Decl. at Exhibit 6, Pgs. 70-71, Lns. 24-13
19 (Q. Do you and your husband have the financial ability to post a bond, what is
20 called an appeal bond, which would be, probably covers the cost of keeping all the
21 accounts open and available during the time period of the appeal. And so
22 sometimes the court will require an appeal bond. Have you talked to your husband
23 about that? A. A little bit. Q. Okay. A. And we have a lot of equity in our house.
24 We have plenty of equity in that. We have a good retirement plan we can borrow
25 against. Q. So you have the financial ability? A. Yes.”).

26 Appellant-Objector Behrend explicitly stated that she had the financial
27 ability to post the bond. She does not now point to evidence in the record to the
28

1 contrary, perhaps because there is none. Instead, she argues—without citation to
2 record evidence or to case law in support of her contention—that “borrowing
3 against the equity of her marital home, raises constitutional issues...” Opp. Mot.
4 App. Bnd., Dkt. No. 270, at 6. This mere assertion is insufficient to satisfy
5 Appellant-Objector Behrend’s burden to establish that she lacks the financial
6 capacity to post the bond and ignores her reference to other assets during her
7 deposition. *See Miletak*, 2012 WL 3686785, at *2, n. 4 (“[F]inancial information”
8 is required; a mere assertion as to financial inability in a declaration, without more,
9 is insufficient and “weighs in favor of imposing a bond.”); *see also In re Initial*
10 *Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (ability to post
11 bond is “presumed” where objectors do not present evidence to the contrary). In
12 reality, Appellant-Objector Behrend has previously objected to class action
13 settlements and is fully aware that her appeal will hold up the Settlement for
14 months, if not years. She had the opportunity to opt out of the Settlement and
15 pursue her claims individually, but chose to object and appeal instead. She should
16 not be allowed to diminish the common fund without any consequences. It should
17 not be an easy decision to hold up Settlement benefits from being distributed to
18 more than 400,000 Class Members. Thus, this factor supports the assessment of a
19 bond. *See In re Netflix*, 2013 WL 6173772, at *3 (“Generally, district courts have
20 found that this first factor weighs in favor of a bond unless a party is financially
21 unable to post a bond.”) (internal citations omitted).

22 **III. CONCLUSION**

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

28 //

1 DATED: November 2, 2017

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