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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ENZO FORCELLATI and LISA
ROEMMICH, on Behalf of Themselves
and all Others Similarly Situated,

Plaintiffs,

v.

HYLAND’S, INC., STANDARD
HOMEOPATHIC LABORATORIES,
INC., and STANDARD
HOMEOPATHIC COMPANY,

Defendants.

Case No. 2:12-CV-01983-ODW-MRW

CLASS ACTION

**PLAINTIFFS’ NOTICE OF
MOTION AND MOTION FOR
APPEAL BOND; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF**

Date: January 8, 2018
Time: 1:30 P.M.
Courtroom 5D, 5th Floor

Hon. Otis D. Wright II

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on Monday, January 8, 2018, at 1:30 P.M., or
3 as soon as may be heard, in the above-entitled court located at First Street Courthouse,
4 350 West 1st Street, 5th Floor, Los Angeles, California 90012, Plaintiffs will and
5 hereby do move this Court pursuant to Federal Rule of Appellate Procedure (“Fed. R.
6 App.”) 7 to order objector Ashley Hammack, who noticed an appeal of this Court’s
7 Settlement Approval Order and Final Judgment (Dkt. No. 307), to post an appeal bond
8 in the amount of \$79,142.00.

9 As outlined further below, an appeal bond is warranted because Ms. Hammack’s
10 appeal lacks merit, there is no evidence that Ms. Hammack is financially unable to post
11 an appeal bond, and her appeal presents significant risk of non-payment of costs if she
12 loses. The amount of the requested appeal bond will ensure funds are available to pay
13 costs recoverable under Fed. R. App. 39 and also cover the increased expense the
14 Settlement Administrator is forced to incur while the appeal is pending. The bond is
15 necessary so that the monetary impact of the groundless appeal is not shouldered by
16 the Settlement Class.

17 Dated: November 2, 2017 Respectfully submitted,
18
19 By: /s/ Benjamin Heikali
20 Benjamin Heikali

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1 **I. Introduction**

2 Plaintiffs respectfully move this Court for an order requiring Objector Ashley
3 Hammack (“Ms. Hammack”)¹ to post an appeal bond pursuant to Federal Rule of
4 Appellate Procedure (“Fed. R. App.”) 7 in the amount of \$79,142.00. This amount
5 includes the costs of the appeal as identified in Fed. R. App. 39(e), as well as increased
6 expenses in settlement administration and administrative costs.

7 This appeal was brought by an often-criticized professional objector, who on
8 September 12, 2017, filed a notice of appeal from this Court’s Settlement Approval
9 Order and Final Judgment. Dkt. No. 307. Mrs. Hammack filed her notice through her
10 counsel, Michael Creamer. Ms. Hammack and her counsel Mr. Creamer have been
11 repeatedly criticized by courts for filing frivolous and meritless objections to
12 settlements for the sole purpose of extracting fees rather than to benefit the class.

13 As discussed in detail herein, all of the factors for determining whether to impose
14 an appeal bond are present in this case. First, the appeals lack merit. For example, Ms.
15 Hammack argues that Plaintiffs purportedly failed to post their motion for attorneys’
16 fees on the class action website for class members to review and object to. Yet Class
17 Counsel submitted detailed and contemporaneous time records and expenses to the
18 Court and posted that information on the settlement website for review for class
19 members prior to the Court’s award for attorneys’ fees and costs in this case.
20 Moreover, there is no evidence that Ms. Hammack is financially unable to post an
21 appeal bond. Lastly, Ms. Hammack’s appeal presents significant risk of non-payment
22 of costs if she loses on appeal. Therefore, this Court should require Ms. Hammack to
23 post an appeal bond.

24
25 _____
26 ¹ Objector Patrick Sweeney failed to pay the docketing and filing fees for his appeal
27 and therefore on October 25, 2017, his appeal was dismissed by the Ninth Circuit for
failure to prosecute pursuant to Ninth Circuit Rule 42-1 (Dkt. No. 314).

1 **II. Procedural and Factual Background**

2 **A. The Settlement**

3 On August 14, 2017, after a fairness hearing that Ms. Hammack did not attend,
4 this Court entered a Settlement Approval Order and Final Judgment (Dkt. No. 306)
5 approving a class settlement that provided both economic and injunctive relief. The
6 settlement was reached on the eve of trial, after four years of litigation, during which
7 time, Plaintiffs completed extensive discovery. This Court’s approval order also
8 awarded attorneys’ fees and costs, and incentive awards to the class representatives.

9 Under the terms of the Settlement Agreement, Defendants have agreed to pay
10 each Settlement Class Member who submits a valid claim form either (1) a full refund
11 of the MSRP for up to two units of the Settlement Class Products with no proof of
12 purchase, or (2) a full refund for three or more units of the Settlement Class Products
13 if proof of purchase is submitted. *See* Stipulation of Settlement (“Settlement” or
14 “Settlement Agreement”) Dkt. No. 275-2 Ex. 1, III.3.1(a). The Parties have also agreed
15 to injunctive relief that requires Defendants to include a money back guarantee on
16 Hyland’s website. *Id.* at III.3.2. Under these terms, the Settlement Class Members can
17 receive full refunds with proof of purchase and two full refunds without submitting any
18 proof of purchase. The maximum amount of damages that each Settlement Class
19 Member would be entitled to recover if Plaintiffs were successful at trial would be the
20 retail price of each of the Settlement Class Products that they purchased. Therefore,
21 the Settlement Class Members are receiving exactly the amount that Plaintiffs sought
22 to recover on their behalf in this action. These terms are clearly fair and represent
23 meaningful economic relief to the Settlement Class. *See* Memorandum of Points and
24 Authorities in Support of Motion for Final Approval of Class Action Settlement, Dkt.
25 No. 291-1 at 16.

1 An extensive notice campaign was undertaken in conformance with the
2 Preliminary Approval Order. *See* Dkt. No. 288 at ¶¶ 7-9. The campaign included
3 notice by U.S. postal mail, e-mail, publication, and internet banner ads. Each of these
4 forms of notice accurately informed Settlement Class Members of the terms of the
5 Settlement, the date of the Final Approval hearing, and the rights of all parties,
6 including Class Members’ rights to file objections and to opt out of the Class. *See* Dkt
7 No. 291-1 at 24-25. As of the end of the claims period, 142,502 individuals had
8 submitted timely claim forms while only fourteen individuals have opted out
9 (approximately 0.01% of total responses). *Id.* at 24. Only three timely objections were
10 received, two of which were from the serial objectors discussed herein. The third
11 objector, Zeynep Vitale, did not file an appeal.

12 A fairness hearing was held on August 14, 2017. That same day this Court
13 entered a Settlement Approval Order and Final Judgment (Dkt. No. 306) approving the
14 Settlement. The Court found that the Notice described above was “successfully
15 implemented and satisfie[d] the requirements of Fed. R. Civ. P. 23 and due process.”
16 Dkt. No. 306 ¶ 4. The Court considered each factor required for certification of the
17 Settlement Class and approved the Settlement as fair, reasonable, and adequate. *Id.* at
18 ¶ 9. Specifically, the Court noted that “the fact that the parties’ agreement is the result
19 of arm’s length negotiations, the risk of trial, and the complex legal and factual posture
20 of this Consolidated Action support the finding that the settlement if fair, adequate, and
21 reasonable.” *Id.* The Court then overruled the objections to the Settlement. *Id.* The
22 Court also awarded attorneys’ fees and costs to Class Counsel, and incentive awards to
23 Plaintiffs in the amount of \$5,000 each. *Id.* at ¶ 11-12.

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B. The Objectors

1. Patrick Sweeney

Mr. Sweeney is a convicted felon² and a serial objector who has filed numerous meritless objections to class settlements. This behavior has drawn repeated criticism from courts across the county, including courts in this District. *See, e.g., Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 890 n.7 (C.D. Cal. 2016) (Judge Olguin noting that Mr. Sweeney is “prolific in objecting to class action settlements” and “well-known for routinely filing meritless objections to class action settlements for the purpose of extracting a fee rather than to benefit the Class.”); *Roberts v. Electrolux Home Prods.*, No. SACV12-1644-CAS(VBKx), 2014 U.S. Dist. LEXIS 130163, at *33-34 (C.D. Cal. Sept. 11, 2014) (Judge Snyder holding that “[t]he Court has considered the objections of Mr. Sweeney, overrules them in their entirety, finds that they are not made for the purpose of benefitting the Class, and finds that they are meritless in all respects.”); *In re TRS Recovery Servs.*, Civ. Dkt. No. 2:13-MD-2426, 2016 U.S. Dist. LEXIS 17837, at *21 n.16 (D. Me. Feb. 10, 2016) (overruling Sweeney’s objection and stating his “listed objections are without merit and appear to be a form document”); *In re Carrier iQ, Inc. Consumer Privacy Litig.*, Case No. 12-md-02330-EMC, 2016 U.S. Dist. LEXIS 114235, at *31-32 (N.D. Cal. Aug. 25, 2016) (overruling objection by Mr. Sweeney and labeling him a “serial objector” who lacked standing to object because the phone number he “provided on his claim form was actually the same number his wife, Pamela Sweeney, previously swore was hers in another case.”); *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 U.S. Dist. LEXIS 19275, , at *29 (N.D. Cal. Feb. 17, 2016) (noting that Mr. Sweeney is a “professional objector”);

² On July 21, 2017, Mr. Sweeney pled guilty to violating 18 USC § 152(3) for bankruptcy fraud. *See United States v. Patrick S. Sweeney*, Case No. 3:16-cr-00103-jdp, Dkt. Nos. 32, 39 (W.D. Wis. July 21, 2017) (attached as **Exs. A and B** to Declaration of Timothy J. Peter (“Peter Decl.”)).

1 *Larsen v. Trader Joe’s Co.*, Case No. 11-cv-05188-WHO, 2014 U.S. Dist. LEXIS
2 95538, at *22-23 n.4 (N.D. Cal. July 11, 2014) (overruling objections and recognizing
3 that “attorney Patrick Sweeney also has a long history of representing objectors in class
4 action proceedings”); *Martin v. Glob. Mktg. Research Servs., Inc.*, Case No. 6:14-cv-
5 01290-Orl-31KRS, Dkt. No. 139, at 2 (M.D. Fl. Nov. 4, 2016) (“Finally, the Court
6 finds that the objection filed by Patrick Sweeney is frivolous and without merit.”). The
7 most scathing criticism of Mr. Sweeney came from Judge Jack Zouhary’s decision in
8 *In re Polyurethane Foam Antitrust Litigation*, 178 F. Supp. 3d 635 (N.D. Ohio 2016).
9 Judge Zouhary described Mr. Sweeney as having “shown bad faith and vexatious
10 conduct, both in prior cases and in this action, in the pursuit of a payoff.” *Id.* at 640.
11 Judge Zouhary further declared that the conduct of Mr. Sweeney and the other objectors
12 “resembles scavenger ants on a jelly roll, scrambling to extort money from the
13 approved settlements.” *Id.*

14 Mr. Sweeney did not appear at the fairness hearing. He objected to the
15 Settlement Agreement as not fair, reasonable, and adequate because (1) the claims
16 administration process had no future oversight, accountability, or reporting about
17 whether the claims process delivers what was promised to the Class; (2) no attorneys’
18 fees were to be withheld to assure that Class Counsel oversee and are involved in the
19 implementation of the settlement; (3) that the amount of attorneys’ fees did not depend
20 on how much relief would be paid to the Class Members; and (4) the attorneys’ fee
21 requested was not reasonable in the absence of more detailed documentation.
22 Objection and Notice of Intent Not to Attend Fairness Hearing of Patrick S. Sweeney
23 (“Sweeney Objection”), Dkt. 296 ¶¶ 1-4. Mr. Sweeney also objected to the
24 “appropriateness of the *cy pres* procedure” and incorporated by reference all other
25 objections made by other objectors. *Id.* ¶¶ 5-7. In its Settlement Approval Order, this
26

1 Court overruled Mr. Sweeney’s objection to the settlement as without merit. Dkt. No.
2 306 ¶ 4.

3 **2. Ashley Hammack**

4 Ms. Hammack and her counsel, Mr. Creamer, are also serial objectors. Last year
5 Ms. Hammack objected to the settlement in *Lerma v. Schiff Nutrition International,*
6 *Inc.*, Case No.: 11-cv-1056-MDD, 2016 U.S. Dist. LEXIS 24748, at *3 (S.D. Cal. Feb.
7 29, 2016). In that case, the court rejected Ms. Hammack’s objection and ordered her
8 to post an appeal bond after concluding that her appeal was “meritless.” *Lerma*, 2016
9 U.S. Dist. LEXIS 24748, at *8-9, 11. In addition, Ms. Hammack also filed two other
10 unsuccessful objections this year. *See Rapoport-Hecht v. Seventh Generation, Inc.*,
11 Case No. 7:14-cv-09087-KMK (S.D.N.Y. Nov. 14, 2014), Dkt. Nos. 56 and 76
12 (approving settlement and rejecting Hammack’s objection); *see also Vincent et al. v.*
13 *People Against Dirty, PBC*, Case No. 7:16-cv-06936-NSR (S.D.N.Y. Sept 2, 2016),
14 Dkt. Nos. 44 and 55 (overruling Hammack’s objection in its entirety and noting that
15 “many of Ms. Hammack’s arguments do not even apply to this settlement and are
16 irrelevant”).

17 Ms. Hammack’s counsel, Mr. Creamer, is also well-known for representing
18 objectors to class action settlements. *See Warner v. Toyota Motor Sales, U.S.A., Inc.*,
19 Case No. CV 15-2171 FMO (FFMx), 2017 U.S. Dist. LEXIS 77576, at *36-38 (C.D.
20 Cal. May 21, 2017) (finding objections to be “without merit”); *In re Google Referrer*
21 *Header Privacy Litig.*, 87 F. Supp. 3d 1122 (N.D. Cal. 2015) (rejecting objections);
22 *Cotter v. Lyft, Inc.*, Case No. 13-cv-04065-VC, 2017 U.S. Dist. LEXIS 38256, at *18-
23 19 (N.D. Cal. Mar. 16, 2017) (overruling objections); *Roos v. Honeywell Int’l, Inc.*,
24 241 Cal. App. 4th 1472, 1486-97 (2015) (rejecting objections on appeal).

25 Neither Ms. Hammack nor her counsel, Mr. Creamer, appeared at the fairness
26 hearing. She objected to the Settlement as not fair, reasonable, and adequate because

1 (1) class counsel had purportedly not posted their motion for attorneys’ fees on the
2 class action website for class members to review and object to; (2) the attorneys’ fees
3 requested were too high and should be reduced to 25% of the class members’ recovery;
4 and (3) the class representative incentive awards were too high and should be reduced
5 to \$2,500 or less. Notice of Objection (“Hammack Objection”) Dkt. 295 at 1-2. In its
6 Settlement Approval Order and Final Judgment, this Court overruled Ms. Hammack’s
7 objection to the settlement. Dkt. No. 306 ¶ 4.

8 **III. Argument**

9 **A. An Order Requiring An Appeal Bond For The Ms. Hammack Is**
10 **Appropriate³**

11 Rule 7 of the Fed. R. App. provides that “[i]n a civil case, the district court may
12 require an appellant to file a bond or provide other security in any form and amount
13 necessary to ensure payment of costs on appeal.” The role of district courts in this
14 context is “taxing the full range of costs of appeal.” *Azizian v. Federated Dep’t Stores,*
15 *Inc.*, 499 F.3d 950, 959 (9th Cir. 2007). “[T]he purpose of the rule is to protect an
16 appellee against the risk of nonpayment by an unsuccessful appellant.” *Fleury v.*
17 *Richemont N. Am., Inc.*, C-05-4525 EMC, 2008 U.S. Dist. LEXIS 88166, at *17-18
18 (N.D. Cal. Oct. 21, 2008) (internal citation omitted). Moreover, “an appellant is less
19 likely to bring a frivolous appeal if he is required to post a sizable bond . . . prior to
20 filing the appeal.” *See Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir.
21 2002).

22 Courts commonly impose appeal bonds in the class action context. *See In re*
23 *Cardizem CD Antitrust Litig.*, 391 F.3d 812, 816-17 (6th Cir. 2004) (endorsing the trial
24

25 ³ Counsel for Ms. Hammack, Mr. Creamer, agreed in writing to counsel for Plaintiffs
26 that Plaintiffs are entitled to an appeal bond pursuant to Fed. R. App. 7, but disputes
27 what the proper amount of the bond is. *See Peter Decl.*, at ¶ 4.

1 court's imposition of a \$174,429 appeal bond); *In re Checking Account Overdraft*
2 *Litig.*, No. 1:09-MD-02036-JLK, 2012 U.S. Dist. LEXIS 18384, at *47 (S.D. Fla. Feb.
3 14, 2012) (ordering class action objectors to post \$616,338 appeal bond); *Barnes v.*
4 *FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *9 (D.
5 Mass. Aug. 22, 2006) (ordering imposition of \$645,111 appeal bond).

6 The need for a bond and its amount are left in the discretion of the district court.
7 *Id.* at 18 (citing Fed. R. App. 7, 1979 advisory committee notes.). Consistent with the
8 purpose of Fed. R. App. 7 and the Ninth Circuit's opinion in *Azizian*, the Court should
9 consider the following factors when determining whether an appeal bond is required:
10 "(1) the appellant's financial ability to post a bond; (2) the risk that the appellant would
11 not pay the appellee's costs if the appeal loses; and (3) merits of the appeal." *Shames*
12 *v. Hertz Corp.*, No. 07-CV-2174-MMA (WMC), 2013 U.S. Dist. LEXIS 85622, at *1
13 (S.D. Cal. June 18, 2013) (citing *Fleury*, 2008 U.S. Dist. LEXIS 88166, at *19). Each
14 of these factors favors imposing a bond in this case.

15 **1. The Appellant's Financial Ability to Post the Bond**

16 It is the objector's burden to show that he or she lacks the financial ability to post
17 a bond. *Redwen v. Sino Clean Energy, Inc.*, CV 11-3936 (SSx), 2013 U.S. Dist. LEXIS
18 197867, at *4 (C.D. Cal. Dec. 20, 2013) (citing *Miletak v. Allstate Ins. Co.*, C 06-03778
19 JW, 2012 U.S. Dist. LEXIS 125426, at *5 (N.D. Cal. Aug. 27, 2012) (absence of
20 evidence that the objector is unable to post bond "weighs in favor of imposing an appeal
21 bond")). Ms. Hammack has not put forth any evidence that she is unable to post a
22 bond. Furthermore, as detailed above, Ms. Hammack is a serial objector who has
23 repeatedly paid the filing fees for her meritless objections and appeals. *See Schulken*
24 *v. Wash. Mut. Bank*, Case No. 09-CV-02708-LHK, 2013 U.S. Dist. LEXIS 48175, at
25 *14 (N.D. Cal. Apr. 2, 2013) (citing *Gemelas v. Dannon Co., Inc.*, No. 1:08 CV 236,
26 2010 U.S. Dist. LEXIS 99503, at *6 (N.D. Ohio Aug. 31, 2010) (finding that a serial

1 objector had the financial ability to pay appeal bond because they had the funds to
2 appeal class action settlements)). Therefore, this factor weighs in favor of imposing a
3 bond.

4 **2. The Risk that the Appellant Would Not Pay the Appellee's** 5 **Costs if the Appeal Loses**

6 There is a significant risk that Ms. Hammack will not pay the costs of the appeal
7 if she loses. Ms. Hammack does not reside in California or a state within the Ninth
8 Circuit. Since she lives in Texas, it will be much more difficult for Plaintiffs to collect
9 costs from her if she is unsuccessful in her appeal. *See Shames*, 2013 U.S. Dist. LEXIS
10 85622, at * 4-5 (finding that where objector is not a resident of California, nor a resident
11 of a state within the Ninth Circuit, it would be more difficult to collect costs on appeal
12 and would weigh in favor of imposing a bond); *In re Initial Public Offering Sec. Litig.*,
13 721 F. Supp. 2d 201, 213 (S.D.N.Y. 2010) (Class Counsel and the Settlement Class
14 “would need to institute collection actions in numerous jurisdictions to recover their
15 costs . . . [resulting in] a significant risk of non-payment.”). Further, though counsel
16 for Plaintiffs and the Class raised the issue of a bond with her counsel, Ms. Hammack
17 has not offered to guarantee payment of costs that would be assessed against her
18 following an unsuccessful appeal to mitigate this risk. *See Peter Decl.*, at ¶ 3. The
19 absence of a guarantee also weighs in favor of an appeal bond. *See Fleury*, 2008 U.S.
20 Dist. LEXIS 88166, at *22-23. Therefore, this factor weighs in favor of imposing a
21 bond for Ms. Hammack.

22 **3. Merits of the Appeal**

23 In analyzing this factor, courts must assess the likelihood that the objector will
24 lose her appeal. *Id.*, at *21. An assessment of both objectors' claims on appeal shows
25 that there is a high likelihood that they will lose on appeal, thus weighing in favor of
26 requiring both objectors to post a bond.

1 At the outset, the objector will have to overcome the highly deferential abuse of
2 discretion standard to prevail on an appeal in this case. *See In re Bluetooth Headset*
3 *Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). “Such review is ‘extremely
4 limited,’ and we ‘will affirm if the district judge applies the proper legal standard and
5 his findings of fact are not clearly erroneous.’” *Id.* (quoting *In re Mego Fin. Corp. Sec.*
6 *Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). A district court’s award of attorneys’ fees
7 and costs, as well as the method of calculation used, are also reviewed under an abuse
8 of discretion standard. *In re Bluetooth Headset*, 654 F.3d at 940. On appeal, Ms.
9 Hammack will be limited to the issues that she raised in her objections. *See Nelson v.*
10 *Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

11 Ms. Hammack’s objections are without merit. *See* Dkt. No. 306 ¶ 9. Ms.
12 Hammack argued that “class counsel has not posted its fee motion on the class action
13 website as of the date of filing of this objection.” Hammack Objection at 1-2. That
14 argument was simply wrong as Class Counsel’s motion for attorneys’ fees was posted
15 on the website on June 20, 2017, the day after it was filed with this Court. *See* Dkt.
16 No. 293. Ms. Hammack also argued that the “class representative’s award is too high.”
17 Hammack Objection at 3. This Court awarded the class representatives’ incentive
18 awards in the amount of \$5,000, and as noted herein, such a decision will be given
19 deferential treatment on review by the Ninth Circuit. Furthermore, contrary to Ms.
20 Hammack’s argument, many courts in the Ninth Circuit have held that a \$5,000
21 incentive award is presumptively reasonable. *See In re Mego Fin. Corp.*, 213 F.3d at
22 457 (approving \$5,000 incentive award); *In re Toys “R” Us–Del., Inc. FACTA Litig.*,
23 295 F.R.D. 438, 470–72 (C.D. Cal. 2014) (holding that a \$5,000 incentive award is
24 “consistent with the amount courts typically award as incentive payments”); *Gonzalez*
25 *v. Southern Wine & Spirits of Am., Inc.*, Case No. 2:11-cv-5849-ODW (PLAx), 2012
26 U.S. Dist. LEXIS 46401, at *16 (C.D. Cal. March 29, 2012) (approving incentive

1 award of \$5,000 to class plaintiff); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573,
2 592 (N.D. Cal. 2015)(“a \$5,000 payment is presumptively reasonable”); *Hawthorne v.*
3 *Umpqua Bank*, Case No. 11-cv-06700-JST, 2015 U.S. Dist. LEXIS 56370, at *26 (N.D.
4 Cal. Apr. 28, 2015) (finding that “\$5,000 is the typical enhancement award in this
5 Circuit”); *Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2012 U.S. Dist. LEXIS
6 13797, at *20 (N.D. Cal. Feb. 6, 2012) (holding that “as a general matter, \$5,000 is a
7 reasonable amount”); *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S.
8 Dist. LEXIS 33900, at *3-4 (N.D. Cal. Apr. 3, 2009) (approving \$5,000 incentive
9 award to one named plaintiff).

10 Finally, Ms. Hammack objected to the attorneys’ fees and costs in this case. Ms.
11 Hammack argued that “this Court should reduce the attorneys’ fees to 25 percent of
12 what the class will actually recover.” Hammack Objection at 2. This Court determined
13 that the attorneys’ fees and costs sought by Plaintiffs’ counsel were fair and reasonable.
14 Dkt. No. 306 ¶ 11. As noted herein, the Ninth Circuit will be highly deferential to this
15 Court’s decision. Furthermore, Ms. Hammack’s objections are contrary to established
16 law. *See Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)
17 (holding it was reversible error to base attorneys’ fees on the amount of money class
18 members claimed and instructing courts to use the lodestar method or the total amount
19 made available to the class to determine attorneys’ fees); *see also Boeing Co. v. Van*
20 *Gemert*, 444 U.S. 472, 480 (1980) (class plaintiffs’ “right to share the harvest of the
21 lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the
22 fund created by the effort of class representatives and their counsel”). Thus, it would
23 be inconsistent with Ninth Circuit and Supreme Court precedent to determine the
24 reasonableness of Class Counsel’s fee request based on consideration of the actual
25 amount paid to or recovered by class members as both objectors argue.

1 Based on the review of the Ms. Hammack’s claims above, there is a high
2 likelihood that she will lose her appeal as her objections are without merit.

3 **B. The Appeal Bond Should Be Set At A Minimum of \$79,142.00**

4 The amount of an appeal bond is within the discretion of the district court. *See*
5 Fed. R. App. 7, 1979 advisory committee notes. The Ninth Circuit has held that the
6 costs referred to in Rule 7 include those costs identified in Fed. R. App. 39(e) as
7 follows: (1) the preparation and transmission of the record; (2) the reporter's transcript,
8 if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other
9 bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.
10 *See Azizian*, 499 F.3d at 958. “In addition, ‘courts have interpreted Rule 7 broadly to
11 include increased expenses in settlement administration and administrative costs.’”
12 *Redwen*, 2013 U.S. Dist. LEXIS 197867, at *6 (quoting *Dennings v. Clearwire Corp.*,
13 928 F. Supp. 2d 1270, 1272 (W.D. Wash. Mar. 11, 2013)); *see also Miletak*, 2012 U.S.
14 Dist. LEXIS 125426, at * 7 (finding “good cause” supported including \$50,000 in
15 “administrative costs” incurred “to continue to service and respond to class members’
16 needs pending the appeal”).

17 Plaintiffs request a bond amount based on the costs identified in Fed. R. App.
18 39(e), as well as increased administrative costs while the appeal is pending. These
19 administrative costs include maintaining and administering the settlement website and
20 toll-free phone number, answering questions from class members, and managing and
21 filing taxes for the settlement account. *See In re Netflix Privacy Litig.*, Case No. 5:11-
22 CV-00379-EJD, 2013 U.S. Dist. LEXIS 168298, at *12 (N.D. Cal. Nov. 25, 2013)
23 (finding that including “administrative costs during the delay of settlement” in \$21,519
24 bond for each objector was proper). Plaintiffs anticipate the need for filing various
25 motions with the appellate court, including but not limited to: moving to dismiss the
26 appeal (see 9th Cir. R. 27-11(a)(1)), moving for summary affirmance (see 9th Cir. R.

1 3-6), and moving for monetary sanctions against Ms. Hammack once their appeals are
2 found to be frivolous (see Fed. R. App. 38, 28 U.S.C. §1912). These anticipated
3 motions will likely involve a substantial amount of time and expense, including filing
4 fees, printing and copying costs, and compilation of the voluminous record. In total,
5 Plaintiffs anticipate expending \$2,500 in administrative costs litigating this appeal.
6 Plaintiffs also estimate that the claims administrating cost in this appeal will be
7 \$3,005.57 per month, over a span of 25.5 months, totaling \$79,142.00⁴. *See* Judicial
8 Business 2016 Tables, Table B-4A, U.S. Courts of Appeals-Median Time Intervals in
9 Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During
10 the 12-Month Period Ending September 30, 2016 at 2, *available at*
11 http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2016.pdf.
12 Plaintiffs estimate that the total costs on appeal will be \$79,142.00. Therefore,
13 Plaintiffs request a bond in the minimum amount of \$79,142.00.

14 **IV. Conclusion**

15 The Settlement Agreement approved by this Court was the result of arms-length
16 negotiation that will provide substantial economic and injunctive relief to the class.
17 Ms. Hammack, a serial objector, impedes that relief. The factors for determining
18 whether an appeal bond should be required weigh strongly in favoring of doing so.
19 Moreover, imposing a bond in this case will provide the necessary security to the class
20 that its recovery will not be delayed and decreased due to meritless appeals. Plaintiffs
21 request that this bond be posted within 14 days of entry of the Court's order.

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23 Dated: November 2, 2017

FARUQI & FARUQI, LLP

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By: /s/ Benjamin Heikali
Benjamin Heikali

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⁴ *See* Declaration of Lana Lucchesi Re: Projected Amount of Administration Costs, at ¶ 2.

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Co-Lead Class Counsel

CERTIFICATE OF SERVICE

1
2 I hereby certify that on November 2, 2017, I authorized the electronic filing of
3 the foregoing with the Clerk of the Court using the CM/ECF system which will send
4 notification of such filing to counsel of record through e-mail addresses denoted on the
5 Electronic Mail Notice List. I further hereby certify that I have e-mailed the foregoing
6 to the non-CM/ECF participants indicated on the Manual Notice List.

7
8 Dated: November 2, 2017

By: /s/ Benjamin Heikali

9 Benjamin Heikali
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