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7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 GARY REDWEN, Individually And On  
11 Behalf Of All Others Similarly Situated,

12 Plaintiffs,

13  
14 v.

15 SINO CLEAN ENERGY, INC., et al.,

16 Defendants.  
17

Case No.: 11-CV-03936 PA (SSx)

**MEMORANDUM OF LAW IN  
SUPPORT OF LEAD  
PLAINTIFF'S MOTION TO  
IMPOSE AN APPEAL BOND**

Hearing Date: December 2, 2013  
Time: 1:30 p.m.  
Courtroom: 15

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1 **Cases**

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8 *Fleury v. Richemont N. Am., Inc.*  
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10 *Hanlon v. Chrysler Corp.*  
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16 *In re Nutella Marketing and Sales Practices*  
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18 *In re Pharmaceutical Industry Average Wholesale Price Litig.*  
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 26 No. C 06-03778, 2012 WL 3686785 (N.D. Cal. Aug. 27, 2012).....*passim*

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1           Lead Plaintiff Perritt Micro Cap Opportunities Fund (“Lead Plaintiff”), on  
2 behalf of itself and the Class, respectfully submits this memorandum of law in  
3 support of Lead Plaintiff’s motion to impose an appeal bond on objector Larry  
4 Vincent.

5 **I.    INTRODUCTION**

6           Mr. Larry Vincent, represented by The Law Office of Gary Sibley (the  
7 “Sibley Firm”), a serial objector, has filed an appeal (ECF 97) from this Court’s  
8 July 9, 2013 Order and Final Judgment (ECF 96) granting final approval of the  
9 class action settlement of this litigation and the award of attorneys’ fees and  
10 costs.<sup>1</sup> His appeal, which appears to be facially frivolous, will substantially delay  
11 the distribution of the settlement fund to the Class members many of whom,  
12 unlike Vincent, properly filed Proofs of Claim and are entitled to a share of the  
13 recovery. Accordingly, an appeal bond should be imposed.

14           Vincent’s appeal is baseless because he has failed to establish that he is a  
15 Class member. He thereby has no standing to object and has no legally  
16 cognizable interest in this case. *See* Order and Final Judgment at 10. Lead  
17 Plaintiff raised this issue before the Final Approval Hearing in Lead Plaintiff’s  
18 Supplemental Memorandum of Law In Further Support of (A) Lead Plaintiff’s  
19 Motion For Final Approval of Settlement and Plan of Allocation and (B) Class  
20 Counsel’s Motion For An Award of Attorneys’ Fees and Reimbursement of  
21 Litigation Expenses, filed June 21, 2013, (ECF 88). Yet Vincent did not file any  
22 evidence in response to this argument to establish his standing, nor did he appear  
23 at the Final Approval Hearing, either personally, or through his counsel. Perhaps  
24 most importantly, and as this Court carefully noted, **Vincent did not file a claim**  
25 **to a share of the recovery.** Therefore, Vincent unquestionably lacks standing to

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26  
27 <sup>1</sup> Attorney Sibley has entered an appearance on behalf of objector Vincent in the  
28 Ninth Circuit proceedings. Sibley did not formally appear in the proceedings  
before this Court.

1 object and his appeal is frivolous. Even if this Court had sustained his baseless  
 2 objections, Vincent would not have been entitled to receive any distribution of the  
 3 settlement fund. *See Silverman v. Motorola Solutions, Inc.*, - - - Fed. Appx. - - -,  
 4 Nos. 12-2339, 12-2354, 2013 WL 4082893, at \* 1, (7th Cir. Aug. 14, 2013)  
 5 (appeal of objector dismissed for lack of interest because he did not file a claim to  
 6 a share of the recovery).

7 Since Vincent has no stake in this case his appeal is frivolous. There is a  
 8 distinct probability that when the appeal is dismissed or this Court's judgment is  
 9 affirmed, the costs that the Class and Class Counsel will incur related to it, such  
 10 as preparing the records, briefs, and continuing to administer the settlement, will  
 11 not be paid by Vincent. In similar contexts, significant appeal bonds are now  
 12 almost universally imposed. *See, e.g., Miletak v. Allstate Ins. Co.*, No. C 06-  
 13 03778, 2012 WL 3686785, at\* 2 (N.D. Cal. Aug. 27, 2012) (\$60,000); *Dennings*  
 14 *v. Clearwire Corp.*, No. C10-1859, 2013 WL 945267 at \*2 (W.D. Wash. March  
 15 11, 2013) (\$41,150); *Embry v. Acer America Corp.*, No. C 09-01808, 2012 WL  
 16 2055030, at \*2 (N.D. Cal. June 5, 2012) (\$70,650).

17 Therefore, for the reasons set forth below, Lead Plaintiff respectfully  
 18 requests that this Court require Vincent to post a bond if he wishes to continue  
 19 prosecuting his appeal of this Court's Final Judgment approving the Settlement.  
 20 Lead Plaintiff respectfully requests that the bond be set at \$17,410.50.

## 21 **II. BACKGROUND**

22 This class action arose from Lead Plaintiff's claim that the price of shares  
 23 of the common stock of Sino Clean Energy, Inc. ("Sino Clean"), acquired  
 24 pursuant to and/or traceable to the Offering,<sup>2</sup> was artificially inflated as a result of  
 25 \_\_\_\_\_

26 <sup>2</sup> The Offering refers to the Secondary Offering of 5,465,000 shares of Sino  
 27 Clean Common Stock offered at a price of \$5.25 per share, pursuant to the  
 28 Registration Statement and Prospectus, which became effective December 21,  
 2010.

1 allegedly material false and misleading statements and omissions issued by  
2 Defendants regarding the business of Sino Clean. Among other things, the  
3 lawsuit alleged that documents filed by Sino Clean with the Securities and  
4 Exchange Commission materially overstated the Company's revenues, production  
5 capacity and production volume for Fiscal Years 2008 and 2009. The Settlement  
6 resolved the action and provided for a \$2,000,000 Settlement Fund for the benefit  
7 of the Class.

8 On March 13, 2013, this Court granted preliminary approval of the  
9 Settlement pursuant to Fed. R. Civ. P. 23(e). (ECF 80). After dissemination of  
10 notice to the settlement class, on or about June 5, 2013, the Court received a  
11 single objection from Vincent. Vincent did not object to the reasonableness and  
12 adequacy of the settlement amount. Rather, he objected that: (1) the established  
13 *de minimis* threshold of \$20.00 for a payable claim is "grossly unfair"; (2) the  
14 imposition of the *de minimis* threshold created a conflict between the class  
15 representative and the Class; (3) the attorneys' fee should be reduced; and (4) the  
16 fee petition was not timely filed. As Lead Plaintiff argued in supplemental  
17 briefing in support of final approval, and this Court ruled, these objections were  
18 without merit. *See* Lead Plaintiff's Supplemental Memorandum In Further  
19 Support Of Motion For Final Approval Of Settlement at 5-11 (ECF 88).

20 This Court held a final approval hearing on July 1, 2013, where all parties  
21 and other interested persons were afforded the opportunity to be heard in support  
22 of or in opposition to the settlement. Vincent did not appear, either in person or  
23 through counsel, even though he had stated in a pleading that he intended to  
24 appear. (ECF 87). On July 9, 2013, this Court granted final approval of the  
25 settlement and entered final judgment. *See* Order and Final Judgment (ECF 96).  
26 In its order, the Court analyzed each of Vincent's objections, overruled them, and  
27 concluded that the settlement was fair, reasonable, and adequate. *Id.* at \*10. The  
28 Court also ordered an appropriate attorneys' fee and cost award. *Id.* at \*12-13.

1 On August 9, 2013, Vincent filed a Notice of Appeal. (ECF 97). The  
 2 settlement does not become “final” under its terms until all appeals are resolved.  
 3 (ECF 76-1 at ¶1(q)). As Vincent certainly understands, no Class members will  
 4 benefit from the settlement until after it is “final.” *Id.* Gilardi, the Court-  
 5 appointed claims administrator, anticipates being able to distribute the settlement  
 6 fund in January 2014, barring any delays associated with the appeal, after the  
 7 conclusion of all the necessary administrative work on the claims and final audits  
 8 are completed. *See* Declaration of Lara McDermott at ¶9 (“McDermott Decl.”),  
 9 filed herewith.

### 10 **III. ARGUMENT**

#### 11 **A. This Court Has the Authority to Impose an Appeal Bond**

12 This Court should impose an appeal bond. “[T]he district court may  
 13 require an appellate bond or provide other security in any form and amount  
 14 necessary to ensure payment of costs on appeal.” *Azizian v. Federated Dept.*  
 15 *Stores, Inc.*, 499 F. 3d 950, 954-955 (9th Cir. 2007) (quoting Fed. R. App. P. 7).  
 16 ““The purpose of an appeal bond is to protect an appellee against the risk of  
 17 nonpayment by an unsuccessful appellant.”” *Miletak*, 2012 WL 3686785, at \*1  
 18 (quoting *Fleury v. Richemont N. Am., Inc.*, 05-4525, 2008 WL 4680033, at \*6  
 19 (N.D. Cal. Oct. 21, 2008)). “[T]he question of the need for a bond, as well as its  
 20 amount are left in the discretion of the trial court.” *Id.* (citing Fed. R. App. P. 7,  
 21 1979 advisory committee notes). An appeal bond is particularly appropriate here  
 22 because of the frivolous nature of Vincent’s appeal.

23 The *Manual for Complex Litigation* has highlighted the problem of  
 24 improper objections to class action settlements:

25 Some objections, however, are made for improper purposes, and  
 26 benefit only the objectors and their attorneys (*e.g.*, by seeking  
 27 additional compensation to withdraw even ill-founded objections).

28 An objection, even of little merit, can be costly and significantly



1 delay implementation of a class settlement. Even a weak objection  
2 may have more influence than its merits justify in light of the  
3 inherent difficulties that surround review and approval of a class  
4 settlement. Objections may be motivated by self-interest rather than  
5 a desire to win significant improvements in the class settlement. A  
6 challenge for the judge is to distinguish between meritorious  
7 objections and those advanced for improper purposes.

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

9 Vincent's objection are meritless, especially since he has no financial stake  
10 whatsoever in the settlement and has failed to demonstrate that he is a Class  
11 member. To allow him to prosecute his frivolous appeal while significantly  
12 delaying distribution to the Class in the absence of an appeal bond is  
13 fundamentally unfair. A bond requirement should therefore be imposed. The  
14 bond should be set at an amount high enough to ensure payment of not only the  
15 expenses likely to be incurred by Class Counsel, but also the additional expenses  
16 to be incurred by the claims administrator. *Dennings*, 928 F.Supp.2d at 1272.

### 17 **B. All of the Factors for Imposing a Bond Are Met**

18 A bond requirement is appropriate here. "In determining whether a bond  
19 should be required, the Court should consider: (1) the appellant's financial ability  
20 to post a bond; (2) the risk that the appellant would not pay the appellee's costs if  
21 the appeal loses; and (3) merits of the appeal." *Shames v. Hertz Corp.*, No. 07-  
22 2174, 2013 WL 3155019, at \*1 (S.D. Cal. June 18, 2013) (quoting *Fluery*, 2008  
23 WL 4680033, at \*6-7). Each of these factors favors imposing an appeal bond.

#### 24 **1. The Appeal Lacks Merit**

25 District courts consider the merits of the appeal when evaluating whether to  
26 require an appeal bond because this factor "informs the likelihood that the  
27 appellant will lose and thus be liable for costs." *Fluery*, 2008 WL 4680033, at \*6.  
28 The district court need not consider whether the appeal is frivolous; sanctions for

1 frivolous appeals are left to the court of appeals. *Azizian*, 499 F.3d at 954 (“a  
2 district court may not include in a Rule 7 bond appellate attorney's fees that might  
3 be awarded by the court of appeals if that court holds that the appeal is frivolous  
4 under Federal Rule of Appellate Procedure 38”). Lead Plaintiff is not including  
5 attorneys’ fees as a basis for the requested bond. Rather, it is based on the costs  
6 of the appeal, including increased administrative costs caused by Vincent’s  
7 frivolous appeal.

8 Courts in this Circuit have imposed bonds on appealing objectors when it is  
9 clear from the outset that the proposed appeal lacks merit, in recognition of the  
10 fact that plaintiffs will incur significant expense in opposing frivolous objections.  
11 *See, e.g., In re Wal-Mart Wage & Hour Employment Practices Litig.*, No. 2:06-  
12 cv-00225, 2010 WL 786513, at \*2 (D. Nev. March 8, 2010) (“The Court further  
13 finds that the four Objectors should be required to file an appeal bond sufficient  
14 to secure and ensure payment of costs on appeals which in the judgment of this  
15 Court are without merit and will almost certainly be rejected by the Ninth Circuit  
16 Court of Appeal.”).

17 As an initial matter, even assuming *arguendo* Vincent’s objections have  
18 some small degree of merit, which they do not, it is unlikely he will prevail on  
19 appeal because this Court’s approval of the settlement will be overturned only if  
20 there has been an abuse of discretion. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
21 1027 (9th Cir. 1998). Given this extremely limited review, and considering this  
22 Court’s careful analysis of the settlement, it is unlikely that this Court’s  
23 conclusion that the settlement is “fair, reasonable, and adequate” will be found to  
24 be an abuse of discretion.

25 Even under a less deferential standard, however, the appeal from denial of  
26 Vincent’s objections is highly unlikely to succeed. The record demonstrates that  
27 Vincent’s objections are without merit and are unlikely to be successful on  
28 appeal, as explained by this Court in its Order and Final Judgment (ECF 96).

1 This Court carefully considered Vincent's objections and overruled them based  
2 on a thorough analysis. Specifically, the Court noted that Vincent did not file a  
3 Proof of Claim nor did he provide any evidence that he is a Class Member.  
4 Simply put, Vincent failed to establish his standing to object.<sup>3</sup> See Order and  
5 Final Judgment at 10. The Court also noted that the \$20.00 minimum check  
6 amount, which Vincent objected to, for payment pursuant to the Plan of  
7 Allocation, is common and beneficial to the Class as a whole since it ensures that  
8 the settlement fund will not be depleted by unnecessary administrative costs. *Id.*  
9 As for the attorneys' fees, the Court noted that the Ninth Circuit benchmark for  
10 this type of case is the 25% awarded and that the objection to the fees lacked  
11 specific facts or legal theories. *Id.* Lastly, the Court found the fee petition was  
12 filed in compliance with the Court's Preliminary Approval Order and before the  
13 deadline to object, and was therefore timely. *Id.*

14 Vincent's written objections were cursory. Moreover, he did not appear at  
15 the final fairness hearing, either in person or telephonically, despite having stated  
16 he would do so. In a similar case, *In re Pharmaceutical Industry Average*  
17 *Wholesale Price Litig.*, 520 F. Supp. 2d 274, 278 (D. Mass. 2007), the district  
18 court imposed an appeal bond on the objector because the objection "was  
19 perfunctory, stating without argument or briefing that the proposed settlement  
20 should not be certified" and because "[n]either the objector nor her counsel  
21 appeared at the hearing to explain the objection." *Id.* at 278. The court explained  
22 that, "[r]equiring objectors to post a bond will ensure that a class litigating a  
23 frivolous appeal will not be injured or held up by spoilers." *Id.*

24 Finally, as the United States District Court for the District of New Jersey  
25 recently found, it is apparent that the Sibley Firm, which represents Vincent on  
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27 <sup>3</sup> Gilardi, the Court-appointed claims administrator, has confirmed that no Proof  
28 of Claim was submitted by Vincent. McDermott Decl. at ¶7.

1 the appeal, is a serial objector that “repeatedly raise[s] objections in class actions  
 2 around the country, further suggest[ing] that [its] appeal in this case is meritless.”  
 3 *In re Nutella Marketing and Sales Practices*, No. 11-1086, 2012 WL 6013276, at  
 4 \*2 (D. N.J. Nov. 20, 2012) (requiring a bond of \$22,500).<sup>4</sup>

## 5 2. Vincent Is Able to Pay For a Bond

6 To the extent Vincent may claim that he cannot post a bond, it is Vincent’s  
 7 burden to show he lacks the financial ability to do so. *Miletak*, 2012 WL  
 8 3686785, at \*2 (absence of evidence that the objector is unable to bond “weighs  
 9 in favor of imposing an appeal bond”); *see also In re Initial Pub. Offering Sec.*  
 10 *Litig.*, 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (ability to post bond is  
 11 “presumed” where objectors do not present evidence to the contrary).  
 12 “[F]inancial information” is required; a mere assertion as to financial ability in a  
 13 declaration, without more, is insufficient and “weighs in favor of imposing a  
 14 bond.” *Miletak*, 2012 WL 3686785, at \*2, n.4.

15 It is unclear how Vincent is employed. However, even if there were “some  
 16 evidence that [he] will have difficulty posting [his] respective bond[s],” when  
 17 there is “significant risk of non-payment of costs and lack of merit in Objectors’  
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19  
 20 <sup>4</sup> Gary Sibley was Daniel Sibley’s attorney when Daniel appealed the decision  
 21 approving the settlement in *Dewey v. Volkswagen AG*, 07-cv-2249-FSH-PS  
 22 (D.N.J.), ECF 268. Although the Third Circuit reversed and remanded, it was not  
 23 on the basis of the Sibley objections. *See Dewey v. Volkswagen Aktiengesellschaft*,  
 24 681 F.3d 170, 181, 190 (3d Cir. 2012). Gary Sibley also represented Janis Johnson  
 25 who objected in *In re: Fossil, Inc., Deriv. Litig.*, no. 06-cv-01672-F (N.D. Tex.),  
 26 ECF 201. Similar to the case here, this objection had to be withdrawn **because she**  
 27 **could not offer proof of beneficial ownership** during the relevant time period.  
 28 *Id.*, ECF 208. Gary Sibley also unsuccessfully objected on behalf of himself in  
*Shabaz v. Polo Ralph Lauren Corp.*, No. 07-cv-1349 (C.D. Cal.), ECF 121. Gary  
 Sibley also represented objector George Sibley in *Union Asset Mgmt. Holding A.G.*  
*v. Dell, Inc.*, 669 F.3d 632, 645 (5th Cir. 2012), where the Fifth Circuit affirmed  
 the district court’s approval of the settlement.

1 appeals, this factor nonetheless tips in favor of requiring a bond.” *In re MagSafe*  
2 *Apple Power Adapter Litig.*, No. C 09-01991, 2012 WL 2339721, at \*2 (N.D.  
3 Cal. May 12, 2012). Courts have even imposed a substantial appeal bond on an  
4 appellant who applied to proceed *in forma pauperis*:

5           Even accepting at face value Rose's affidavit submitted in  
6           conjunction with her application to proceed on appeal *in forma*  
7           *pauperis*, the Court concludes that Rose can afford to post a bond in  
8           the amount of \$15,000. That amount would protect Plaintiffs against  
9           the possibility that Rose might refuse to pay costs in the event that  
10          her appeal is unsuccessful.

11 *In re Wachovia Corp. Pick-A Payment Mortgage Marketing and Sales Practices*  
12 *Litig.*, No. 09-2015, 2011 WL 3648508, at \*1 (N.D. Cal. Aug. 18, 2011).

13           **3. There Is Substantial Risk That Vincent Will Not Pay Costs**  
14           **in Absence of a Bond**

15           Courts have found that imposition of a bond is favored when, like here,  
16           most or all of the objectors are outside of this District. *See Shames*, 2013 WL  
17           3155019, at \*1 (citing *Fluery*, 2008 WL 4680033, at \*7). Indeed, in *Dennings*,  
18           the district court found that there is “a risk of non-payment of appeal costs given  
19           that both objectors live in Texas, and it may therefore be difficult to enforce a  
20           cost order imposed upon them.” *Dennings*, 928 F.Supp.2d at 1272; *see also*  
21           *Embry*, 2012 WL 2055030 at \*1 (finding that when analyzing the difficulty of  
22           collecting payment factor, the fact that the objector resided outside of the  
23           jurisdiction of the Ninth Circuit weighed in favor of requiring a bond): *MagSafe*  
24           *Apple Power Adapter Litig.*, 2012 WL 2339721, at \*2 (same).

25           This factor weighs heavily in favor of requiring a bond here because  
26           Vincent and his lawyer are in Texas.

1           **C.     The Appeal Bond Should Be Set at \$17,410.50**

2           The amount of the bond should be sufficient to cover Class  
3 Plaintiffs/appellees' anticipated costs on appeal. *See MagSafe Apple Power*  
4 *Adapter Litig.*, 2012 WL 2339721, at \*2; *Miletak*, 2012 WL 3686785 at \*1; *In re*  
5 *Wal-Mart Wage & Hour Employment Practices Litig.*, No. 06-00225, 2010 WL  
6 786513 at \*2 (D.Nev. March 8, 2010). "Courts have interpreted 'costs' broadly  
7 in the context of class settlements to include increased expenses in settlement  
8 administration, administrative costs, and interest on the settlement that would  
9 have accrued during appeal." *Dennings*, 928 F.Supp.2d at 1272.

10           Lead Plaintiff respectfully requests that the appeal bond be set at  
11 \$17,410.50. This is an estimate of the amount required to secure the costs that  
12 will likely be taxable on appeal and, as demonstrated below, is calculated as the  
13 sum of the estimated appellate costs allowed under Rule 39 of the Federal Rules  
14 of Appellate Procedure, together with additional settlement administration costs  
15 caused by the delay in disbursement of the settlement fund to the Class.  
16 McDermott Decl. ¶9. As demonstrated below, \$17,410.50 is a reasonable  
17 estimate of such costs.

18           **1.     Appellate Costs Allowed Under FRAP 39(e)**

19           The Ninth Circuit has held that the Rule 7 costs on appeal include those  
20 identified in Federal Rule of Appellate Procedure 39(e), which include  
21 preparation of the record, reporter's transcript, and filing fees. *Azizian*, 499 F.3d  
22 at 958 ("We read this language to mean that the costs identified in Rule 39(e) are  
23 among, but not necessarily the only, costs available on appeal."). The costs of  
24 preparing and filing the record and briefs and the cost of the reporter's transcript  
25 are estimated to be \$900.00. Declaration of Thomas C. Bright In Support Of  
26 Lead Plaintiff's Motion to Impose an Appeal Bond ("Bright Decl.") at ¶4. In  
27 *Dennings*, the court found \$2,000 to be a reasonable amount for the cost of  
28

1 acquiring a transcript and filing documents with the court. *See Dennings*, 928  
2 F.Supp.2d at 1272.

## 3 2. Settlement Administration Costs

4 “[C]ourts have interpreted Rule 7 broadly to include increased expenses in  
5 settlement administration and administrative costs.” *Dennings*, 928 F.Supp.2d at  
6 1272; *see also Miletak*, 2012 WL 3686785, at \*2 (finding “good cause” supported  
7 including \$50,000 in “administrative costs” incurred in order “to continue to  
8 service and respond to class members’ needs pending the appeal”).

9 The claims administrator has estimated, based on previous experience, that  
10 if the appeal further extends the time period of the settlement administration, the  
11 additional fees and expenses will be approximately \$1,485.00 per month,  
12 depending on the call and email volume, as well as case coordination and  
13 management during the pending appeal. *See McDermott Decl.* at ¶9. In addition  
14 to these monthly costs, Gilardi estimates a fixed fee of \$1,215.00, for a case-  
15 specific Interactive-Voice-Response (IVR) phone system, website updates, and  
16 renewed address verification searches to determine if any claimants moved during  
17 the appeals period. *Id.*

18 The average administration expenses per month are \$1,485.00. The  
19 median length of appeals in the Ninth Circuit is 15.3 months. *See Bright Decl.*  
20 Ex. A (2012 Annual Report).<sup>5</sup> Because the Notice of Appeal was filed on August  
21 9, 2013, and the distribution of the settlement fund is scheduled for January 2014  
22 without accounting for Vincent’s appeal, applying the average delay period would  
23 extend the time to distribution approximately 10.3 months. Therefore,

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24  
25 <sup>5</sup> The median length of appeals of 15.3 months appears in the Ninth Circuit’s  
26 2012 annual report – the Circuit’s most recent one – on page 61. The 2012 annual  
27 report is available from the Circuit’s “Library” web page at  
28 <http://www.ce9.uscourts.gov/publications/AnnualReport2012.pdf>, last visited on  
October 17, 2013.

1 multiplying the average expense of \$1,485.00 per month by 10.3 months and  
2 adding the one-time fixed fee of \$1,215.00 results in the expected additional  
3 administration costs of \$16,510.50, which are attributable to the delay caused by  
4 Vincent's appeal.

5 These expenses are reasonable and necessary and should be borne by  
6 Vincent if he is unsuccessful. Lead Plaintiff requests that \$16,510.50 be included  
7 in the amount of the appellate bond.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Lead Plaintiff respectfully requests that this  
10 Court impose against Vincent a \$17,410.50 appeal bond to be posted within seven  
11 (7) calendar days from the date this Court's order is served by overnight delivery  
12 on Vincent.

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14 Dated: October 28, 2013

Respectfully submitted,

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16 GOLD BENNETT CERA & SIDENER LLP

17 By: s/Thomas C. Bright

18 Thomas C. Bright

19 Attorneys for Lead Plaintiff  
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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this action.

I hereby certify that on October 29, 2013, a true and correct copy of the foregoing will be placed in a sealed envelope for overnight delivery, addressed as follows:

**Via FedEx**

Larry Vincent  
c/o Gary W. Sibley  
The Sibley Firm  
2602 McKinney Avenue, Suite 210  
Dallas, TX 75204  
(214) 522-5222  
(214) 855-7878 (Fax)

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 28, 2013.

s/Thomas C. Bright  
Thomas C. Bright