

ROBBINS GELLER RUDMAN  
& DOWD LLP  
PATRICK J. COUGHLIN (111070)  
patc@rgrdlaw.com  
JASON A. FORGE (181542)  
jforge@rgrdlaw.com  
RACHEL L. JENSEN (211456)  
rjensen@rgrdlaw.com  
DANIEL J. PFEFFERBAUM (248631)  
dpfefferbaum@rgrdlaw.com  
JEFFREY J. STEIN (265268)  
jstein@rgrdlaw.com  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

ZELDES HAEGGQUIST & ECK, LLP  
AMBER L. ECK (177882)  
ambere@zhlaw.com  
225 Broadway, Suite 2050  
San Diego, CA 92101  
Telephone: 619/342-8000  
619/342-7878 (fax)

Class Counsel

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SONNY LOW, J.R. EVERETT and  
JOHN BROWN, on Behalf of  
Themselves and All Others Similarly  
Situating,

Plaintiffs,

vs.

TRUMP UNIVERSITY, LLC, a New  
York Limited Liability Company and  
DONALD J. TRUMP,

Defendants.

No. 3:10-cv-0940-GPC(WVG)

CLASS ACTION

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
APPEAL BOND

DATE: June 21, 2017

TIME: 1:30 p.m.

CTRM: 2D

JUDGE: Hon. Gonzalo P. Curiel

[Caption continued on following page.]



# TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. RELEVANT BACKGROUND.....	2
III. APPLICABLE LEGAL STANDARD.....	3
IV. THE COURT SHOULD ORDER SIMPSON TO POST AN APPEAL BOND TO SECURE COSTS FOR THE CLASS .....	4
A. Simpson Likely Has the Financial Ability to Post a Bond .....	4
B. There Is a Very Real Risk of Non-Payment in this Case .....	5
C. Simpson Will Likely Lose the Appeal.....	8
V. THE REQUESTED BOND AMOUNT IS APPROPRIATE .....	10
A. The Bond Amount Should Cover Items Enumerated in FRAP 39 and 28 U.S.C. §1920 .....	10
B. The Bond Amount Should Cover Additional Administrative Costs of Servicing Class Members During Simpson’s Appeal .....	11
VI. CONCLUSION .....	19

**TABLE OF AUTHORITIES**

**Page**

**CASES**

<i>Azizian v. Federated Dep't Stores, Inc.</i> , 499 F.3d 950 (9th Cir. 2007) .....	3, 11, 12
<i>Beck-Ellman v. Kaz USA, Inc.</i> , No. 3:10-CV-02134-H-DHB, 2013 U.S. Dist. LEXIS 189308 (S.D. Cal. June 11, 2013) .....	18
<i>Churchill Vill., L.L.C. v. GE</i> , 361 F.3d 566 (9th Cir. 2004) .....	8
<i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269 (W.D. Tex. 2007) .....	4
<i>Dennings v. Clearwire Corp.</i> , 928 F. Supp. 2d 1270 (W.D. Wash. 2013) .....	13
<i>Embry v. ACER Am. Corp.</i> , No. C 09-01808 JW, 2012 U.S. Dist. LEXIS 78068 (N.D. Cal. June 5, 2012) .....	5, 13
<i>Estrin v. Fromsky</i> , 53 Cal. App. 2d 253 (1942) .....	17, 18
<i>Four in One Company, Inc. v. S.K. Foods, L.P.</i> , No. 2:08-cv-3017 KJM EFB, 2014 U.S. Dist. LEXIS 113084 (E.D. Cal. Aug. 14, 2014) .....	12
<i>Gellis v. Verizon Commc'ns, Inc.</i> , No. 3:07-cv-03679-JSW, slip op. (N.D. Cal. Mar. 25, 2013) .....	13
<i>Genesis Merch. Partners, LP v. Nery's USA, Inc.</i> , No. 11-cv-1589, 2013 U.S. Dist. LEXIS 190983 (S.D. Cal. Dec. 6, 2013) .....	17
<i>Golloher v. Todd Christopher Int'l, Inc.</i> , No. C 12-06002 RS, 2014 U.S. Dist. LEXIS 91942 (N.D. Cal. July 7, 2014) .....	17

	Page
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998).....	8
<i>Heekin v. Anthem, Inc.</i> , No. 1:05-cv-01908-TWP-TAB, 2013 U.S. Dist. LEXIS 26700 (S.D. Ind. Feb. 27, 2013).....	11, 13
<i>In re Am. Express Anti-Steering Rules Antitrust Litig.</i> , Nos. 11-MD-2221, 13-CV-7355 (NGG) (RER), 2015 U.S. Dist. LEXIS 102714 (E.D.N.Y. Aug. 4, 2015).....	7
<i>In re Broadcom Corp. Sec. Litig.</i> , No. SACV 01-275, 2005 U.S. Dist. LEXIS 45656 (C.D. Cal. Dec. 5, 2005).....	13
<i>In re Cardizem CD Antitrust Litig.</i> , 391 F.3d 812 (6th Cir. 2004).....	11, 12, 13
<i>In re Checking Account Overdraft Litig.</i> , No. 1:09-MD-02036-JLK, 2012 U.S. Dist. LEXIS 18384 (S.D. Fla. Feb. 14, 2012) .....	13
<i>In re Heritage Bond Litig.</i> , No. MDL 02-ML-1475 DT, 2005 WL 2401111 (C.D. Cal. Sept. 12, 2005) .....	4
<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i> , 187 F.R.D. 124 (S.D.N.Y. 1999).....	13
<i>In re Netflix Privacy Litig.</i> , No. 5:11-CV-00379-EJD, 2013 U.S. Dist. LEXIS 168298 (N.D. Cal. Nov. 25, 2013) .....	passim
<i>In re Nutella Mktg. &amp; Sales Practices Litig.</i> , 589 F. App'x 53 (3d Cir. 2014).....	13
<i>In re Online DVD-Rental Antitrust Litig.</i> , 779 F.3d 934 (9th Cir. 2015).....	8

1		
2		<b>Page</b>
3		
4	<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> ,	
5	520 F. Supp. 2d 274 (D. Mass. 2007).....	13
6	<i>In re Polyurethane Foam Antitrust Litig.</i> ,	
7	178 F. Supp. 3d 635, 641 (N.D. Ohio 2016) .....	6, 8, 10, 19
8	<i>In re Swenson</i> ,	
9	No. 1:10-CV-00175-EJL, 2013 U.S. Dist. LEXIS 175589	
10	(D. Idaho Dec. 9, 2013) .....	13
11	<i>In re Uponor, Inc.</i> ,	
12	No. 11-MD-2247, 2012 U.S. Dist. LEXIS 130140	
13	(D. Minn. Sept. 11, 2012) .....	13
14	<i>In re Wal-Mart Wage &amp; Hour Emp't Practices Litig.</i> ,	
15	No. 2:06-CV-00225-PMP-PAL, 2010 U.S. Dist. LEXIS 21466	
16	(D. Nev. Mar. 8, 2010) .....	13
17	<i>Interlabservice, OOO v. Illumina, Inc.</i> ,	
18	No. 15cv2171-KSC, 2016 U.S. Dist. LEXIS 137952	
19	(S.D. Cal. Oct. 4, 2016) .....	18
20	<i>Marek v. Chesny</i> ,	
21	473 U.S. 1 (1985) .....	11, 12
22	<i>Miletak v. Allstate Ins. Co.</i> ,	
23	No. C06-03778 JW, 2012 U.S. Dist. LEXIS 125426	
24	(N.D. Cal. Aug. 27, 2012) .....	4, 11, 13, 14
25	<i>Officers for Justice v. Civil Serv. Comm'n</i> ,	
26	688 F.2d 615 (9th Cir. 1982) .....	9, 10
27	<i>Perry v. Schwarzenegger</i> ,	
28	602 F.3d 976 (9th Cir. 2010) .....	1, 14
	<i>Petersen v. CJ Am., Inc.</i> ,	
	No. 14-CV-2570 DMS JLB, 2016 U.S. Dist. LEXIS 140188	
	(S.D. Cal. Sept. 30, 2016) .....	17

1		
2		<b>Page</b>
3		
4	<i>Redwen v. Sino Clean Energy, Inc.,</i>	
5	No. CV 11-3936 PA, 2013 U.S. Dist. LEXIS 197867	
6	(C.D. Cal. Dec. 20, 2013).....	13
7	<i>Vaughn v. Am. Honda Motor Co.,</i>	
8	627 F. Supp. 2d 738 (E.D. Tex. 2007) .....	13
9	<b>STATUTES, RULES AND REGULATIONS</b>	
10	28 U.S.C.	
11	§1920 .....	1, 10, 11
12	§1927 .....	10
13	Federal Rules of Civil Procedure	
14	Rule 1 .....	19
15	Rule 23(d)(1) .....	15
16	Rule 23(e) .....	8
17	Rule 23(h) .....	1, 12
18	Rule 68.....	11
19	Federal Rules of Appellate Procedure	
20	Rule 7.....	3, 4, 10
21	Rule 39.....	1, 10
22	Rule 39(e) .....	10, 11
23	California Code of Civil Procedure	
24	§1032 .....	17
25	§1033.5 .....	17
26	§1033.5(a)(8) .....	17
27	§1033.5(c).....	17
28	§1033.5(c)(4) .....	17
	Florida Statutes	
	§501.211(3).....	18
	Civil Local Rules for the Southern District of California	
	Rule 65.1.2.....	18

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

**Page**

New York Rules of Professional Conduct

Rule 7.3(a)(1)..... 8



1 **I. INTRODUCTION**

2 After enduring six-and-a-half years of hard-fought litigation, and a decade since  
 3 some Class Members used their credit cards to purchase a Trump University Live  
 4 Event, the only obstacle remaining in the way of Eligible Class Members recovering  
 5 90 cents on the dollar is Sherri Simpson's meritless appeal of this Court's order  
 6 approving the Settlement.<sup>1</sup> Simpson's appeal is delaying Settlement payments to  
 7 Class Members that they may need to get out of debt, replenish retirement funds, or  
 8 confidently enter retirement. As the appeal may well take years to resolve, payments  
 9 will be delayed too long for many Class Members who may declare bankruptcy, lose  
 10 homes, decline in health to the point where they cannot enjoy the money, or die before  
 11 it is over.<sup>2</sup>

12 While the human costs cannot be calculated, Simpson's appeal will also result  
 13 in quantifiable monetary costs. These costs include the unavoidable additional costs  
 14 of servicing the Class during a lengthy appeal process, thus wasting funds that would  
 15 otherwise go to Class Members for their *pro rata* recoveries. Unless Simpson posts a  
 16 bond to guarantee payment of these costs, the Class recovery will be unfairly at risk.

17 Pursuant to Federal Rule of Appellate Procedure ("FRAP") 7, Rule 23(h), and  
 18 Local Civil Rule ("Local Rule") 65.1.2, plaintiffs respectfully ask the Court to order  
 19 Simpson to post a bond of \$220,833, or in an amount this Court deems appropriate, to  
 20 secure payment of: (1) FRAP 39 and 28 U.S.C. §1920 taxable costs; and (2) the  
 21 additional administration costs of servicing the Class. An appropriate bond is needed  
 22 in this case so that the Class Members are not left holding the bag once Simpson and  
 23 her attorneys are done appealing a Settlement that she admits is a "laudable result."

24 \_\_\_\_\_  
 25 <sup>1</sup> Capitalized terms have the same meanings as set forth in the Stipulation of Class  
 Action Settlement ("Agreement"), unless otherwise noted. *See Low Dkt. 583-1.*

26 <sup>2</sup> On May 16, 2017, plaintiffs filed an unopposed motion to expedite the appeal, but  
 27 the Ninth Circuit has not yet ruled. *See 9th Cir. Dkt. 14.* Based on past cases, such a  
 28 motion is by no means a *fait accompli*. *See, e.g., Perry v. Schwarzenegger*, 602 F.3d  
 976, 982 (9th Cir. 2010) (dismissing appeal; denying as moot motion to expedite).

1 **II. RELEVANT BACKGROUND**

2 On March 6, 2017, five weeks after submitting a sworn Claim Form to partake  
3 in the excellent benefits conferred by the Settlement, Simpson filed an objection  
4 seeking to opt out of it after being telephone solicited by her attorney, Gary Friedman,  
5 apparently due to her appearance on an anti-Trump PAC video. *Low Dkt.* 612 at 1, 4.  
6 Simpson has no objection to the Settlement, instead calling it a “laudable result” with  
7 which many Class Members “may justifiably be satisfied.” *Low Dkt.* 593 at 10. Of  
8 the thousands of Class Members in the related class actions nationwide, Simpson was  
9 the only one who filed a procedurally-valid objection. *Low Dkt.* 583 at 9-10.

10 At the March 30, 2017 Fairness Hearing, Simpson’s attorney (Friedman) made  
11 two critical admissions: (1) Simpson was not aware of the parenthetical upon which  
12 her entire objection was based until (2) he telephonically solicited her (although  
13 Friedman denied that his solicitation was unethical). *See Ex. 1*,<sup>3</sup> 3/30/17 Hrg. Tr. at  
14 28:15-20, 29:12-14, 29:25-30:1; *Low Dkt.* 618 at 17-18.

15 On March 31, 2017, this Court issued an order granting final approval of the  
16 Settlement and plaintiffs’ motion for approval of the Class Representative Awards.  
17 *See Low Dkt.* 618. In approving the Settlement, the Court found:

18 [T]he amount offered in settlement provides ***significant and immediate***  
19 ***recovery*** for Eligible Class Members. The ***extraordinary*** amount of  
20 recovery for Eligible Class Members—an estimated 80%, and potentially  
21 higher—is all the more ***exceptional*** when viewed in light of the risk of  
22 establishing liability at trial, the likelihood of appeal, the possibility of  
23 reversal, the complexity of conducting thousands of individual damages  
24 determinations, and the likely lengthy duration of further litigation.  
25 Moreover, none of the amount offered in settlement will inure to Class  
26 Counsel’s benefit, as Class Counsel do not seek any fees or costs.<sup>4</sup>

23 *Low Dkt.* 618 at 8; *see Ex. 1* at 34:12-23 (at Fairness Hearing, Class Counsel  
24 represented that Eligible Class Members were likely to recoup 90% based upon the

25 <sup>3</sup> Here, and throughout, unless otherwise noted, references to “Ex.” are to the  
26 Exhibits attached to the Declaration of Rachel L. Jensen (“Jensen Decl.”), filed  
concurrently.

27 <sup>4</sup> Emphasis is added and citations and internal quotation marks are omitted here and  
28 throughout, unless otherwise noted.

1 Claim Forms that had been verified to date, and NYAG's recent commitment of \$1.6  
2 million to the Class based on the projected notice and administrative costs at the time).

3 The Court also overruled Simpson's objection. Among other reasons, the Court  
4 reasoned that there is no due process right to a second opt-out opportunity in this  
5 Circuit, and the 2015 Long-form Class Notice did not create such a right in this case.  
6 *See Low* Dkt. 618 at 14-17. As to the parenthetical in the Long-form Notice:

7 At most, the plain language of Section 13 confers on Simpson a right to  
8 be notified of how to ask the Court to exclude her from the Settlement.  
9 Any right to "ask to be excluded" does not equate to a right to opt out.  
10 Indeed, by Simpson's counsel's own admission at the final approval  
11 hearing, Simpson, who is an attorney, did not read or understand the  
12 Section 13 parenthetical to guarantee her a second opt-out opportunity.  
13 Simpson's belief that she is entitled to a settlement-stage opt-out  
14 opportunity was not based on an objective reading of the Notice's  
15 language. Nor was it based on a subjective misunderstanding of the  
16 Notice's language. Rather, *Simpson did not identify the Section 13  
17 parenthetical as important in any way, until she conferred with  
18 counsel.* This admission sheds light on what an objective reading of  
19 Section 13 entails—an average Class Member (and here, an attorney, no  
20 less) would not objectively understand the parenthetical to guarantee a  
21 settlement-stage opt-out opportunity that would allow absent class  
22 members to pursue separate litigation against Defendants.

23 *Id.* at 17-18. The Court denied Simpson's request to be excluded. *See id.* at 19-21.

24 Notwithstanding her admissions at the Fairness Hearing, this Court's sound  
25 order overruling her objection, and with full knowledge of the delay her appeal would  
26 engender for elderly Class Members, Simpson filed a notice of appeal on May 1,  
27 2017. Class Counsel urged Simpson to withdraw her appeal to avoid this untenable  
28 injury. *See Ex. 2* (5/3/17 Letter from Rachel Jensen to Gary Friedman). Simpson  
refused.

### 29 **III. APPLICABLE LEGAL STANDARD**

30 Pursuant to FRAP 7, this Court has the power to order an appellant to post an  
31 appeal bond in an amount it deems appropriate. *See Azizian v. Federated Dep't*  
*Stores, Inc.*, 499 F.3d 950, 954 (9th Cir. 2007). FRAP 7 provides: "In a civil case, the  
district court may require an appellant to file a bond or provide other security in any  
form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7.

The purpose of an appeal bond is to protect an appellee against the risk of nonpayment by an unsuccessful appellant. *See In re Netflix Privacy Litig.*, No. 5:11-CV-00379-EJD, 2013 U.S. Dist. LEXIS 168298, at \*7-\*8 (N.D. Cal. Nov. 25, 2013). “[R]equiring a bond is a common procedural device to protect the parties’ interests. An appeal bond is not uncommon in these circumstances [of a class action settlement,] given the delay and costs which may be incurred by the class by an appeal.” *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 316 (W.D. Tex. 2007) (“recognizing ‘[f]ederal courts have required an appeal bond from appellants . . . as a condition of maintaining objector appeals of class action settlements or attorneys’ fee awards’”) (citing, *inter alia*, *In re Heritage Bond Litig.*, No. MDL 02-ML-1475 DT, 2005 WL 2401111, at \*3 (C.D. Cal. Sept. 12, 2005)).

FRAP 7 gives this Court discretion to fashion an appropriate appeal bond, as the Advisory Committee Notes to FRAP 7 explain: “The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.” Fed. R. App. P. 7 adv. comm. note to 1979 amendments.

#### **IV. THE COURT SHOULD ORDER SIMPSON TO POST AN APPEAL BOND TO SECURE COSTS FOR THE CLASS**

While the Ninth Circuit has not laid down the requisite elements for an appeal bond, district courts generally consider three factors: “(1) appellant’s financial ability to post a bond, (2) the risk that appellant would not pay the costs if the appeal loses, and (3) an assessment of the likelihood that appellant will lose the appeal and be subject to costs.” *Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*7-\*8; *Miletak v. Allstate Ins. Co.*, No. C06-03778 JW, 2012 U.S. Dist. LEXIS 125426, at \*4 (N.D. Cal. Aug. 27, 2012). Each factor weighs in favor of ordering an appeal bond here.

##### **A. Simpson Likely Has the Financial Ability to Post a Bond**

The first factor is whether an appellant has the financial ability to post a bond. *See Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*8. “Generally, district courts have found that this first factor weighs in favor of a bond unless a party is financially

1 unable to post a bond.” *Id.* It is not sufficient for an objector-appellant to argue that a  
2 bond is burdensome; she must provide “evidence indicating a financial inability to  
3 pay.” *Id.*; *see also Embry v. ACER Am. Corp.*, No. C 09-01808 JW, 2012 U.S. Dist.  
4 LEXIS 78068 (N.D. Cal. June 5, 2012) (noting that objector provided no evidence of  
5 inability to pay bond and ordering him to post \$70,650 bond within 14 days or dismiss  
6 appeal).

7 Here, Simpson is a lawyer who has her own private practice in Fort Lauderdale,  
8 Florida. *See* Ex. 3 (LinkedIn profile). Simpson was admitted to the Florida Bar in  
9 1990. *See* Ex. 4 (Florida Bar profile). According to her firm website, Simpson’s for-  
10 profit Simpson Law Group specializes in “consumer and business financial  
11 restructuring, including assignments for the benefit of creditors, bankruptcy, asset  
12 protection and creative options, as well as foreclosure defense litigation.” *See* Ex. 5  
13 (last visited on May 16, 2017). Moreover, the fact that Simpson is willing to delay her  
14 own Settlement payment to pursue this years-long appeal indicates that she has  
15 financial resources. Simpson is likely to have the financial ability to post a bond.  
16 Accordingly, this factor weighs in favor of requiring an appeal bond.

17 **B. There Is a Very Real Risk of Non-Payment in this Case**

18 The second factor is “the risk that an appellant would not pay the costs if the  
19 appeal loses.” *See Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*8. District courts in  
20 California recognize “the difficulty and risk associated with collecting costs from out-  
21 of-state appellants.” *See id.* This factor weighs heavily in favor of a bond when the  
22 objector-appellant lives outside the jurisdiction of the Ninth Circuit. *See id.*; *see also*  
23 *Embry*, 2012 U.S. Dist. LEXIS 78068, at \*5. Simpson lives in Fort Lauderdale,  
24 Florida, obviously outside California and the Ninth Circuit. *See Low Dkt. 592* at 1.

25 Simpson presents a unique risk of non-payment as she specializes in bankruptcy  
26 law and has invoked Chapter 13 to shield herself from debt in the past (though her  
27 petition was dismissed for failure to file the necessary documents). *See* Exs. 6-7.  
28 Simpson’s website is literally called [www.gochapter13.com](http://www.gochapter13.com). *See* Ex. 5.



1 In addition, this factor weighs in favor of an appeal bond in this case because  
2 both Simpson and her attorney Gary Friedman have “a history of showing disrespect  
3 for legal ethics and the rules of court.” *In re Polyurethane Foam Antitrust Litig.*, 178  
4 F. Supp. 3d 635, 641 (N.D. Ohio 2016).

5 Here, Simpson has been the subject of disciplinary proceedings by the Florida  
6 Bar and sanctioned several times by courts, including for committing fraud on the  
7 court and failing to comply with court orders. *See* Exs. 8-10. For example, in  
8 sanctioning Simpson for abandoning her client, a Florida federal court found:

9 Ms. Simpson’s actions are puzzling given her fairly *significant*  
10 *disciplinary history*. She was admonished by the Florida Bar in 2002.  
11 She has also been sanctioned twice before. *In re Ocon*, 2009 WL  
12 405370 (11th Cir. Feb. 19, 2009) (affirming sanctions against Ms.  
13 Simpson after she knowingly made false statements to the bankruptcy  
14 court); *In re MacNeal*, 308 Fed. Appx. 311, 317 (11th Cir. 2009)  
15 (affirming sanctions against Ms. Simpson and others for discovery  
16 abuses). . . .

17 In addition to her disciplinary history, *Ms. Simpson has a*  
18 *documented history of failing to abide by court deadlines and orders*.  
19 For instance, in *Leardi v. Vestrhein*, 04-61162-Civ-Gold, DE 11 (S.D.  
20 Fla. Dec. 1, 2004), the court issued a show cause order against the  
21 defendant, whom Ms. Simpson alone represented, based on his failure to  
22 file an answer brief by deadline. More recently, in *Letterese v. Church*  
23 *of Scientology*, 09-60327-Civ-Altonaga, Ms. Simpson – as appellant’s  
24 only counsel of record – moved for an additional one-week extension to  
25 file an initial brief after having been previously granted an extension.  
26 Her second motion was denied for failure to include a proposed order. A  
27 few days later, because the motion was not refiled, the court, *sua sponte*,  
28 set a deadline for filing the initial brief and advised that failure to do so  
would result in a dismissal. Consistent with this warning, when no initial  
brief was filed, the case was “dismissed for lack of prosecution.” At the  
hearing, Ms. Simpson claimed that the *Letterese* matter was “absolutely”  
not dismissed as a result of any actions on her part. (Sanctions Hr’g Tr.  
9:20-23). The record, as discussed above, belies this claim.

29 *Ms. Simpson’s actions – or lack thereof – in this and other*  
30 *matters manifest a stunning disregard for the entirety of the justice*  
31 *system*. She neglected her client’s case, prevented the defense from  
handling the case in the normal practice, and unduly delayed the  
Court. . . .

32 Ex. 8 at Exhibit B (pages 4-5) (Report Recommending Sanctions Against Plaintiff’s  
33 Attorney, Order of Magistrate Judge Dave Lee Brannon); *id.* at Exhibit C (Order  
34 Adopting in Part Magistrate Report); *see also* Exs. 9-10.

1 Simpson's history not only calls into further question the veracity of her  
2 declarations in this case (which were already undermined by Friedman at the Fairness  
3 Hearing), but renders her a risk of non-payment for the costs of her appeal. At a  
4 minimum, Simpson is likely to try to avoid payment of these costs, which means an  
5 appeal bond is the only way to ensure the Class will not have to pay for *two* sets of  
6 distributions of Awards to thousands of Eligible Class Members: first, a distribution  
7 of the Settlement Awards (less the costs on appeal); and second, a later distribution of  
8 the costs on appeal that are recovered from Simpson.

9 For his part, Gary Friedman has been removed as class counsel after a federal  
10 court found that he had engaged in unethical conduct and "blatant violations of the  
11 [court's] protective orders." *In re Am. Express Anti-Steering Rules Antitrust Litig.*,  
12 Nos. 11-MD-2221, 13-CV-7355 (NGG) (RER), 2015 U.S. Dist. LEXIS 102714, at  
13 \*51-\*53 (E.D.N.Y. Aug. 4, 2015); Ex. 11. As the court found, Friedman repeatedly  
14 and knowingly sent "emails containing [AmEx's] confidential and highly confidential  
15 information" to counsel for its competitor MasterCard, Keila Ravelo, in violation of  
16 protective orders. *Am. Express*, 2015 U.S. Dist. LEXIS 102714, at \*52. The court  
17 also concluded that Friedman betrayed the loyalty of his clients and co-counsel by  
18 divulging their privileged information to defense counsel (Ravelo) without their  
19 consent. *Id.* As the court found, "Friedman and Ravelo were in frequent, possibly  
20 constant, communication regarding the negotiating process and status of both the 1720  
21 MDL settlement and the Class Settlement Agreement." *Id.* at \*55-\*57; *see also* Ex.  
22 12 (Letter from Willkie Farr). Ravelo has since been charged with multiple counts of  
23 wire fraud and tax evasion for an alleged fraudulent invoicing scheme to enrich  
24 herself and her husband, Melvin Feliz, by billing for litigation support services that  
25 were never performed. *See* Ex. 13 at 1. In Ravelo's criminal proceedings, Friedman  
26 has been described as a "possible co-conspirator of Miss Ravelo." *Id.* at 6 & 14 n.16.

27 Friedman's ethically-suspect conduct has impacted this case, too. There would  
28 be no objection – and no appeal – but for the fact Friedman telephone solicited

1 Simpson in violation of New York ethical rules (*see* N.Y. R. Prof'l Conduct  
2 7.3(a)(1)), though Friedman denies it was an ethical breach. *See* Ex. 1, 3/30/17 Hrg.  
3 Tr. at 28:3-30:2. Friedman has proffered no evidence, however, that he lacked any  
4 motive for pecuniary gain and such a statement would hold little water, in any event,  
5 given his aggressive pursuit of national headlines in representing Simpson in this  
6 matter. *See, e.g.*, Ex. 14 (3/6/17 Friedman press release re Trump University  
7 settlement "in jeopardy" issued before filing the Simpson objection).

8 As Simpson lives outside the Ninth Circuit, and as she and Friedman "have a  
9 history of showing disrespect for legal ethics and the rules of court," this factor  
10 weighs heavily in favor of a bond. *See Polyurethane Foam*, 178 F. Supp. 3d at 641.

### 11 **C. Simpson Will Likely Lose the Appeal**

12 The third factor is "the likelihood that an appellant will lose the appeal and be  
13 subject to costs." *See Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*9. This factor  
14 weighs in favor of an appeal bond where, as here, the district court "engaged in an  
15 extensive analysis of the Settlement, including the merits of the objections, and found  
16 the Settlement to be fair, adequate, and reasonable." *Id.*

17 Under Rule 23(e), a district court has broad discretion to determine whether a  
18 class action settlement is fair, adequate, and reasonable, under all the circumstances.  
19 *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).  
20 Accordingly, this Court's approval of the Settlement will not be disturbed by the  
21 Ninth Circuit, absent an abuse of discretion, with factual findings to be reviewed only  
22 for clear error. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th  
23 Cir. 2015); *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004).

24 Here, out of approximately 7,000 Class Members, only one filed a procedurally-  
25 valid objection: Sherri Simpson. *See Low Dkt. 583* at 9-10. This Court held a  
26 Fairness Hearing and thereafter issued a Final Approval Order, overruling Simpson's  
27 objection and providing an "extensive analysis of the Settlement, including the merits  
28 of the objections, and found the Settlement to be fair, adequate, and reasonable." *See*



1 *Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*9; *Low* Dkts. 617-618. As the Court  
2 pointed out in its Final Approval Order:

3 [T]he amount offered in settlement provides *significant and immediate*  
4 recovery for Eligible Class Members. The *extraordinary* amount of  
5 recovery for Eligible Class Members—an estimated 80%, and potentially  
6 higher—is all the more *exceptional* when viewed in light of the risk of  
7 establishing liability at trial, the likelihood of appeal, the possibility of  
reversal, the complexity of conducting thousands of individual damages  
determinations, and the likely lengthy duration of further litigation.  
Moreover, none of the amount offered in settlement will inure to Class  
Counsel’s benefit, as Class Counsel do not seek any fees or costs.

8 *Low* Dkt. 618 at 8; *see* Ex. 1 at 34:12-23 (Class Counsel represented to Court that  
9 Eligible Class Members were likely to recoup 90 cents on the dollar based on  
10 purchases verified to date, along with NYAG’s commitment to provide at least \$1.6  
11 million of their share of the global settlement towards Class Member recoveries).

12 Simpson does not object to the amount of the Settlement, nor could she, given  
13 that it is estimated to recover 90 cents on the dollar for Eligible Class Members. *Low*  
14 Dkt. 618 at 7. To the contrary, Simpson calls the Settlement a “laudable result.” *Low*  
15 Dkt. 593 at 10. Her only objection is to the lack of a second opt-out opportunity, and  
16 the circumstances suggest that it is driven by political animus: She wants “the  
17 [P]resident’s apology,” which is not a recoverable form of relief. *See* Ex. 15.

18 Moreover, the arguments that Simpson is likely to advance in her appeal are  
19 well settled in the Ninth Circuit. For example, the Ninth Circuit has already  
20 considered and rejected Simpson’s argument that due process requires a second opt-  
21 out opportunity. *See Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 635  
22 (9th Cir. 1982) (cited in *Low* Dkt. 618 at 14)). This Court also found that Simpson  
23 lacked standing to pursue her objection. *See Low* Dkt. 618 at 13. At the Fairness  
24 Hearing, Friedman conceded that Simpson was not aware of the parenthetical in the  
25 2015 Long-form Class Notice upon which her objection hinges until he telephone  
26 solicited her. *See Low* Dkt. 618 at 17-19. In addition to being unethical, as well as  
27 undermining Simpson’s supplemental declaration, Friedman’s admission means  
28 Simpson neither relied on, nor suffered any injury from, that parenthetical phrase

1 which *at most* would have conferred upon her the right for an opportunity to *ask* the  
2 Court to exercise its discretion and exclude her. *See id.* Assuming *arguendo* that the  
3 2015 Class Notice conferred such a right (it did not), Simpson has now received that  
4 opportunity. *See id.* at 19-21. She asked, and this Court exercised its discretion to  
5 decline her request. *See id.*

6 Given that this Court's Final Approval Order correctly recited the legal  
7 standards, methodically reviewed the relevant factors, and carefully considered  
8 Simpson's objection, Simpson is not likely to succeed on the merits of her appeal. As  
9 all three factors weigh in favor of requiring an appeal bond, the Court should order  
10 Simpson to post a bond in an amount sufficient to protect the Class against the very  
11 real risk of non-payment in this case.

12 **V. THE REQUESTED BOND AMOUNT IS APPROPRIATE**

13 Once the Court decides that an appeal bond is warranted, it must next determine  
14 the appropriate amount. FRAP 7 confers broad discretion on this Court to order a  
15 bond in "any form and amount necessary to ensure payment of costs on appeal." Fed.  
16 R. App. P. 7. Here, the Class seeks a cash bond sufficient to secure the cost of items  
17 enumerated in FRAP 39 and 28 U.S.C. §1920, as well as the additional settlement  
18 administration costs likely incurred during the pendency of the appeal.<sup>5</sup>

19 **A. The Bond Amount Should Cover Items Enumerated in**  
20 **FRAP 39 and 28 U.S.C. §1920**

21 First, this Court should order Simpson to post an appeal bond in an amount that  
22 will cover taxable costs enumerated in FRAP 39(e) and 28 U.S.C. §1920. *See, e.g.,*  
23 *Polyurethane Foam*, 178 F. Supp. 3d at 642-43. FRAP 39(e) lists the following  
24 categories of taxable costs: (1) preparation and transmission of the record;  
25 (2) reporter's transcripts; (3) premiums paid for a bond; and (4) fees for filing the

26 <sup>5</sup> While Class Counsel have tirelessly represented the Class for seven years *pro*  
27 *bono*, as to Simpson's appeal, at the end of the appeal, plaintiffs will seek from her  
28 attorneys' fees and all other damages caused by her appeal pursuant to FRAP 39 and  
28 U.S.C. §1927. *See* Ex. 2 at 2. Plaintiffs do not seek an appeal bond for these  
attorneys' fees and other damages at this time, but reserve their right to seek them.

1 notice of appeal. *See* Fed. R. App. P. 39(e). In addition, §1920's taxable costs  
2 include: (1) marshal and clerk fees; (2) court reporter fees and transcripts; (3) printing  
3 and witness fees; (4) copying fees; (5) docket fees; and (6) compensation of court  
4 appointed experts and interpreters. 28 U.S.C. §1920.

5 In this case, plaintiffs only seek the modest sum of \$500 to cover their costs of  
6 physically preparing the Ninth Circuit briefs, ordering court transcripts, and  
7 supplementing the record. *See* Jensen Decl., ¶3. This amount is extremely low  
8 compared to other large class settlements. *See, e.g., Miletak*, 2012 U.S. Dist. LEXIS  
9 125426, at \*2 (\$60,000 appeal bond, including \$10,000 in FRAP 39(e) costs).

10 Accordingly, the Court should include \$500 in the appeal bond to cover costs  
11 that are taxable under 28 U.S.C. §1920 and FRAP 39(e).

12 **B. The Bond Amount Should Cover Additional Administrative**  
13 **Costs of Servicing Class Members During Simpson's**  
**Appeal**

14 Second, this Court should order Simpson to post an appeal bond in an amount  
15 that secures additional administrative costs of servicing the Class during the appeal.  
16 "Appeal bonds are often required on appeals of class action settlements or attorneys'  
17 fee awards because the appeal effectively stays the entry of final judgment, the claims,  
18 process, and payment to all class members." *Heekin v. Anthem, Inc.*, No. 1:05-cv-  
19 01908-TWP-TAB, 2013 U.S. Dist. LEXIS 26700, at \*4-\*5 (S.D. Ind. Feb. 27, 2013)  
20 (alteration omitted). "In class action cases, therefore, bonds are used to cover excess  
21 administrative costs that otherwise would not have been incurred." *Id.* (citing cases).

22 In *Azizian*, the Ninth Circuit followed the Supreme Court's decision in *Marek v.*  
23 *Chesny*, 473 U.S. 1 (1985), which concerned the scope of "costs" recoverable in the  
24 context of a Rule 68 offer of judgment, as well as the decisions of sister circuits,  
25 including *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004). *See*  
26 *Azizian*, 499 F.3d at 958. Consistent with these authorities, the Ninth Circuit held that  
27 "the term 'costs on appeal' in [FRAP] 7 includes all expenses defined as 'costs' by an  
28 applicable fee-shifting statute, including attorney's fees." *Id.* The Ninth Circuit

1 reasoned that, in light of the “varying definitions of ‘costs’ [FRAP] 7’s drafters . . . did  
2 not define the term [‘cost,’] they likely ‘intended [it] to refer to all costs properly  
3 awardable’ at the conclusion of the appeal, including attorney’s fees authorized by  
4 relevant statutory authority.” *Id.* (quoting *Marek*, 473 U.S. at 8-9).

5 *Azizian*’s rationale that the term “costs” should be construed broadly enough to  
6 cover all costs that are awardable at the end of the appeal is particularly appropriate in  
7 the class action context, where Rule 23(h) grants the Court discretion to “award  
8 reasonable attorney’s fees and nontaxable costs that are authorized by law or by the  
9 parties’ agreement.” Fed. R. Civ. P. 23(h). Indeed, courts routinely award hundreds  
10 of thousands of dollars in “costs” in connection with class settlements. *See, e.g., Four*  
11 *in One Company, Inc. v. S.K. Foods, L.P.*, No. 2:08-cv-3017 KJM EFB, 2014 U.S.  
12 Dist. LEXIS 113084, at \*40-\*41 (E.D. Cal. Aug. 14, 2014) (awarding \$267,926.23 in  
13 costs to class counsel in connection with class settlement that released RICO claims).

14 While the Ninth Circuit has not squarely addressed the inclusion of settlement  
15 administrative costs in an appeal bond, *Azizian* cited with approval the Sixth Circuit’s  
16 *Cardizem* decision, which did. *See Azizian*, 499 F.3d at 955, 961 (citing *Cardizem*,  
17 391 F.3d at 814-15). In *Cardizem*, the Sixth Circuit affirmed a \$174,429 appeal bond  
18 imposed on an objector “‘for filing and brief preparation costs,’ ‘incremental  
19 administration costs,’ and ‘projected attorneys’ fees.’” *Azizian*, 499 F.3d at 961  
20 (quoting *Cardizem*, 391 F.3d at 814-15). Of that amount, the appeal bond included  
21 “\$123,429.00 in incremental administration costs” likely to be incurred during the  
22 pendency of the appeal. *See Cardizem*, 391 F.3d at 815. In affirming the district  
23 court’s appeal bond, *Cardizem* looked to the Supreme Court’s *Marek* decision – a  
24 decision upon which *Azizian* also relied. *See id.* at 817. As in *Marek*, the Sixth  
25 Circuit held that courts deciding an appropriate amount for an appeal bond should  
26 consider “what sums are ‘properly awardable under the relevant substantive statute or  
27 other authority.’” *Id.* (citing *Marek*, 473 U.S. at 9). To answer this question, the court  
28 should consider, in turn, “all of the various state and federal statutes asserted by the

plaintiffs during the class actions could be considered in determining what sums were properly awardable.” *Id.* As the state law claim in the underlying action permitted recovery of all damages, including attorneys’ fees and costs, the court found that administrative costs were properly included in the amount of the appeal bond. *See id.* at 818.

Consistent with these principles, many district courts within the Ninth Circuit and beyond have imposed appeal bonds that include the additional administrative costs of servicing Class Members as a result of the objector’s appeal. *See, e.g., Netflix*, 2013 U.S. Dist. LEXIS 168298, at \*12.<sup>6</sup> In *Netflix*, for example, the Northern District of California ordered each of the 11 objectors to post an appeal bond of \$21,344 – totaling \$234,784 – to secure payment of administrative costs likely to be incurred during the appeal. *See id.* at \*10-\*11. Such administrative costs included maintaining and administering the settlement website and toll-free phone number, answering questions from class members, managing and filing taxes for the settlement and escrow account, and paying storage costs. *See id.* And in *Miletak*, the court

---

<sup>6</sup> *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App’x 53, 61 (3d Cir. 2014) (affirming \$22,500 appeal bond that included settlement administrative costs); *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 U.S. Dist. LEXIS 197867, at \*6-\*7 (C.D. Cal. Dec. 20, 2013) (\$16,510.50 appeal bond); *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270 (W.D. Wash. 2013) (\$41,150 appeal bond); *In re Swenson*, No. 1:10-CV-00175-EJL, 2013 U.S. Dist. LEXIS 175589, at \*2 (D. Idaho Dec. 9, 2013) (\$25,000 appeal bond); *Gellis v. Verizon Commc’ns, Inc.*, No. 3:07-cv-03679-JSW, slip op., Dkt. 146 (N.D. Cal. Mar. 25, 2013) (\$25,000 appeal bond); *Heekin*, 2013 U.S. Dist. LEXIS 26700, at \*4-\*5 (appeal bond including \$235,000 for administrative costs); *In re Uponor, Inc.*, No. 11-MD-2247 ADM/JJK, 2012 U.S. Dist. LEXIS 130140 (D. Minn. Sept. 11, 2012) (\$170,000 appellate bond which included \$20,000 for additional administrative costs); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2012 U.S. Dist. LEXIS 18384 (S.D. Fla. Feb. 14, 2012) (\$616,338 appeal bond); *Embry*, 2012 U.S. Dist. LEXIS 78068 (\$70,650 appeal bond); *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, No. 2:06-CV-00225-PMP-PAL, 2010 U.S. Dist. LEXIS 21466, at \*17-\*18 (D. Nev. Mar. 8, 2010) (\$500,000 appeal bond); *In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d 274 (D. Mass. 2007) (ordering \$61,000 appeal bond); *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738 (E.D. Tex. 2007) (\$150,000 appeal bond); *In re Broadcom Corp. Sec. Litig.*, No. SACV 01-275 DT (MLGx), 2005 U.S. Dist. LEXIS 45656, at \*8-\*12 (C.D. Cal. Dec. 5, 2005) (\$517,700 appeal bond); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 124, 129 (S.D.N.Y. 1999) (\$101,500 appeal bond, including attorney’s fees and settlement administration fees).



1 ordered the objector to post a bond of \$60,000, including \$50,000 in administrative  
2 costs, such as “costs incurred in order to continue to service and respond to class  
3 members’ needs pending the appeal.” 2012 U.S. Dist. LEXIS 125426, at \*6-\*7.

4 Here, too, including administrative costs in the bond amount makes perfect  
5 sense because Simpson’s appeal will impose additional hard costs for settlement  
6 administration that cannot now be avoided. Class Members who were within weeks  
7 of getting a check for \$30,000 or more – an annual income for some – will now be put  
8 off for up to three years.<sup>7</sup> See <http://www.ca9.uscourts.gov/content/faq.php> (last  
9 visited May 22, 2017) (appeals may last 32 months from filing of notice of appeal  
10 until decision is issued). In fact, the anti-SLAPP appeal in the *Low* Action took 35  
11 months from the filing of the notice of appeal to the date of remand. See *Low* Dkts. 43  
12 (anti-SLAPP appeal filed in Jan. 2011) & 282 (mandate issued in Dec. 2013). Class  
13 Members, including Class Representatives Sonny Low, John Brown, and J.R. Everett,  
14 need their Settlement payments to pay off their credit-card debt, replenish waning  
15 retirement funds, or retire. See Jensen Decl., ¶¶4-8. But they will now be forced to  
16 wait for years more to do so, a cruel irony after the many litigation battles they  
17 endured to get this far. For the elderly, those struggling financially, and the sick, the  
18 delay caused by Simpson’s appeal will deal an especially hard blow. See *id.* And for  
19 some Class Members whose health is failing or who will pass away before the appeal  
20 is concluded, relief will now come too late. See *id.*

21 It is reasonable to expect that this years-long delay will inspire many confused,  
22 anxious, and desperate phone calls, emails, and letters from Class Members, which  
23 cannot be ignored. Instead, in accordance with this Court’s settlement approval  
24 orders, the Court-appointed Settlement Administrator must continue to promptly  
25 handle inquiries from Class Members, which already pour in daily by phone, the

---

26 <sup>7</sup> Plaintiffs have filed an unopposed motion to expedite the appeal, which may  
27 reduce the overall length of the appeal. Unfortunately, we cannot predict if and when  
28 the Ninth Circuit will rule on, much less grant, that motion. See, e.g., *Perry*, 602 F.3d  
at 982 (dismissing appeal and denying as moot motion to expedite appeal).

1 website, email, and mail. *See, e.g., Low Dkt.* 584 at 9. This translates into thousands  
2 of dollars incurred in hard costs every month, with the anticipated volume of inquiries  
3 expected to increase over time, as Class Members grow more agitated and more  
4 desperate. *See* Declaration of Edward A. Wulff (“Wulff Decl.”), ¶¶6-7, filed  
5 concurrently; *see also* Declaration of Charles Marr (“Marr Decl.”), ¶5, filed  
6 concurrently. The BBB expects to bill between \$2,500 and \$3,500 every month  
7 during the pendency of the appeal, particularly given the high volume of  
8 communications that it has received, and expects to continue to receive, from Class  
9 Members and others. *See* Wulff Decl., ¶6. Absent the appeal, the BBB had planned  
10 to distribute the Awards to Eligible Class Members this summer and conclude the vast  
11 majority of the settlement administration work by the end of 2017. *See id.* Simpson’s  
12 appeal now means that this work of settlement administration could be drawn out past  
13 2017 for an additional 25 months (or more), which means the Class will be forced to  
14 pay approximately \$75,000 in additional monthly costs from the BBB alone. *See id.*

15 Moreover, to proactively allay the anxieties and concerns of thousands of Class  
16 Members nationwide, the Court should order periodic status updates to be mailed out  
17 during the appeal. *See* Fed. R. Civ. 23(d)(1) (providing courts with authority to give  
18 “appropriate notice to some or all class members of: (i) any step in the action;” and  
19 “(E) deal with similar procedural matters”). The Court-appointed Notice and  
20 Settlement Administrators both recommend such periodic status update letters be  
21 provided to the Class as a proactive measure to avoid pandemonium. *See* Wulff Decl.,  
22 ¶7; Marr Decl., ¶6. The BBB recommends that a notice be sent out every three to six  
23 months and estimates that each mailing will cost \$14,868, which includes the costs of  
24 preparing the notice, stuffing the envelopes, mailing out the notices, processing the  
25 return mail, performing address searches for the returned mail, and resending out  
26 returned mail to the new addresses. *See* Wulff Decl., ¶7. If the appeal lasts 32 months  
27 in total, with a notice being sent out every 4.5 months on average, these notices are  
28 likely to cost a total of \$89,208. *See id.*

1 The Settlement Website and toll-free number will also need to stay operational  
2 for several more years than was anticipated. *See* Marr Decl., ¶4. These likely costs  
3 include the expense of maintaining and periodically revising the Settlement Website  
4 as well as the telephone hotline script. *See id.* Other monthly costs will also be  
5 extended out for several more years, including document storage, project management  
6 costs, and other systems support. *See id.* The Court-appointed Notice Administrator,  
7 Epiq, which is assisting the BBB with the website and toll-free number and other  
8 tasks, expects that the unanticipated costs resulting from Simpson's appeal will run  
9 approximately \$2,245 per month for a total of \$56,125 resulting from a 25-month  
10 delay. *See* Marr Decl., ¶8.

11 Finally, when it comes to distributing the Net Settlement Fund, the delay will  
12 exact additional costs on the distribution process as well. Specifically, the fact that  
13 some Eligible Class Members will have moved or died before the conclusion of the  
14 appeal means that more Award checks will go uncashed; undeliverable Award checks  
15 will be returned; more advanced-level address searches will be performed; more  
16 postage fees will be required to re-mail letters and Award checks; and more checks  
17 will have to be re-issued to a new address or the next of kin. *See* Marr Decl., ¶¶7-8.

18 Based on experiences in prior cases and the notice and settlement  
19 administration costs in these Actions to date, Simpson's appeal will likely cost an  
20 additional \$220,333 to service the Class while Settlement payments are delayed,  
21 including the cost of periodic updates to the Class as described herein. *See* Wulff  
22 Decl., ¶¶6-7; Marr Decl., ¶8. All of these hard costs will be incurred due to Simpson's  
23 appeal and, therefore, should be factored into the total amount of the appeal bond  
24 imposed on Simpson to pursue her appeal.<sup>8</sup>

---

25  
26 <sup>8</sup> These costs do not include the burden on Class Counsel of responding to the steady  
27 stream of phone calls and emails that we receive from Class Members on a daily basis.  
28 As noted above, plaintiffs will seek all of their costs, along with their reasonable  
attorneys' fees at the conclusion of Simpson's appeal.



1 Where courts have declined to include administrative costs in an appeal bond,  
2 the moving party failed to identify a relevant statute supporting such costs. *See, e.g.,*  
3 *Golloher v. Todd Christopher Int'l, Inc.*, No. C 12-06002 RS, 2014 U.S. Dist. LEXIS  
4 91942, at \*5 (N.D. Cal. July 7, 2014) (observing that plaintiffs “pointed to no rule or  
5 statute that would render objectors liable for the ‘administrative costs’”).

6 In contrast, here, the underlying California claims in the *Low* Action give this  
7 Court discretion to award costs to a prevailing party that are necessarily incurred and  
8 reasonable in amount. *See* Cal. C.C.P. §§1032, 1033.5(c)(4) (“Items not mentioned in  
9 this section and items assessed upon application may be allowed or denied in the  
10 court’s discretion.”); *Petersen v. CJ Am., Inc.*, No. 14-CV-2570 DMS JLB, 2016 U.S.  
11 Dist. LEXIS 140188, at \*3-\*4 (S.D. Cal. Sept. 30, 2016) (awarding costs under Cal.  
12 C.C.P. §1033.5 for UCL, FAL, and CLRA class claims); *Genesis Merch. Partners, LP*  
13 *v. Nery’s USA, Inc.*, No. 11-cv-1589 JM(WVG), 2013 U.S. Dist. LEXIS 190983 (S.D.  
14 Cal. Dec. 6, 2013) (awarding discretionary costs to prevailing defendants pursuant to  
15 Cal. C.C.P. §1033.5). Indeed, this Court looked to Cal. C.C.P. §1033.5 in awarding  
16 over \$8,000 in costs to former plaintiff Makaeff for her successful anti-SLAPP motion  
17 in the *Low* Action. *See Low* Dkt. 404 at 49 n.30 & 50.

18 Here, the additional administrative costs that will be incurred due to Simpson’s  
19 appeal are recoverable either as fees of experts ordered by the Court pursuant to Cal.  
20 C.C.P. §1033.5(a)(8), or as discretionary costs that are “reasonably necessary”  
21 pursuant to Cal. C.C.P. §1033.5(c). As California courts have found, the “[e]xpense  
22 of services of an expert accountant, necessary for the proper presentation and  
23 determination of the case, who is appointed by and acting under the direction of the  
24 court, is properly charged as an item of costs.” *Estrin v. Fromsky*, 53 Cal. App. 2d  
25 253, 255 (1942). By virtue of the Court’s approval orders and the Settlement terms,  
26 the Court-appointed Settlement Administrator must continue to service the Class  
27 Members throughout the pendency of the appeal. *See, e.g., Low* Dkt. 584 at 9-10.  
28 These hard costs are, thus, recoverable as “costs” pursuant to the certified California

1 claims. *See id.* Even if these costs are not deemed fees of court-ordered experts, the  
2 Court may allow them as discretionary costs that are “reasonably necessary” to the  
3 orderly conduct of the litigation. *See Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-  
4 02134-H-DHB, 2013 U.S. Dist. LEXIS 189308, at \*27 (S.D. Cal. June 11, 2013)  
5 (awarding over \$312,000 in costs for UCL, FAL, and CLRA claims).

6 Moreover, Local Rule 65.1.2 provides an independent source of authority for  
7 this Court to order a bond in an amount to secure payment of these costs: “A judge  
8 may, upon demand of any party, where authorized by law and for good cause shown,  
9 require any party to furnish security for costs which may be awarded against such  
10 party in an amount and on such terms as are appropriate.” S.D. Cal. Civ. L.R. 65.1.2.  
11 As plaintiffs have shown above, there is good cause to order Simpson to post a bond  
12 because she poses a very real risk of non-payment and is likely to lose the appeal. *See*  
13 *supra*, §§IV.B-C; *see, e.g., Interlabservice, OOO v. Illumina, Inc.*, No. 15cv2171-  
14 KSC, 2016 U.S. Dist. LEXIS 137952 (S.D. Cal. Oct. 4, 2016) (ordering bond where  
15 plaintiff was a foreign corporation and defendant showed it was likely to prevail).

16 Finally, the Florida Deceptive and Unfair Trade Practices Act, a certified claim  
17 in the *Low* Action, also provides an independent basis to order a bond:

18 In any action brought under this section, upon motion of the party  
19 against whom such action is filed alleging that the action is frivolous,  
20 without legal or factual merit, or brought for the purpose of harassment,  
21 the court may, after hearing evidence as to the necessity therefor, require  
the party instituting the action to post a bond in the amount which the  
court finds reasonable to indemnify the defendant for any damages  
incurred, including reasonable attorney’s fees.

22 Fla. Stat. §501.211(3). Here, too, Simpson’s appeal lacks legal or factual merit for the  
23 reasons stated above, and her ill-advised pursuit of her objection on appeal will inflict  
24 hundreds of thousands of dollars of unanticipated costs on the Class.

25 Accordingly, plaintiffs respectfully submit that the Court should include  
26 \$220,333 in additional administrative costs likely to be incurred during the appeal.

**VI. CONCLUSION**

This Court has supervised this litigation for years, “working with the parties to meet the goals of Federal Civil Rule 1 in a way that allowed for a just resolution.” *Polyurethane Foam*, 178 F. Supp. 3d at 645-46. To now have Simpson delay that resolution for obvious political reasons is both a detriment to the Class and an insult to the judicial system. *See id.* Plaintiffs ask the Court to require Simpson to either post an appeal bond of \$220,833 (or in another amount that this Court deems appropriate) or to file a notice of dismissal of her appeal within seven days of this Court’s order.

DATED: May 24, 2017

Respectfully submitted,

ROBBINS GELLER RUDMAN  
& DOWD LLP  
PATRICK J. COUGHLIN  
JASON A. FORGE  
RACHEL L. JENSEN  
DANIEL J. PFEFFERBAUM  
JEFFREY J. STEIN

s/ Rachel L. Jensen

RACHEL L. JENSEN

655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

ZELDES HAEGGQUIST & ECK, LLP  
AMBER L. ECK  
225 Broadway, Suite 2050  
San Diego, CA 92101  
Telephone: 619/342-8000  
619/342-7878 (fax)

Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 24, 2017.

s/ Rachel L. Jensen  
RACHEL L. JENSEN

ROBBINS GELLER RUDMAN  
& DOWD LLP

655 West Broadway, Suite 1900  
San Diego, CA 92101-8498  
Telephone: 619/231-1058  
619/231-7423 (fax)

E-mail: rachelj@rgrdlaw.com

### Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Wallace Moore Allan**  
tallan@omm.com
- **Xavier Jay Alvarez**  
jaya@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Andrew G. Celli , Jr**  
acelli@ecbalaw.com
- **Brian E. Cochran**  
bcochran@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Patrick J Coughlin**  
patc@rgrdlaw.com,e\_file\_sd@rgrdlaw.com,susanm@rgrdlaw.com
- **Amber Lee Eck**  
ambere@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Kevin Eng**  
keng@mzclaw.com
- **Jason A Forge**  
jforge@rgrdlaw.com,tholindrake@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Gary B Friedman**  
GFriedman@flgllp.com
- **Jeffrey L. Goldman**  
jgoldman@bbwg.com
- **Alreen Haeggquist**  
alreenh@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Rachel L Jensen**  
rjensen@rgrdlaw.com,lmix@rgrdlaw.com,llendzion@rgrdlaw.com,e\_file\_sd@rgrdlaw.com,hbrown@rgrdlaw.com,mbacci@rgrdlaw.com,JayA@rgrdlaw.com,KLavelle@rgrdlaw.com
- **David Lee Kirman**  
dkirman@omm.com,awyman@omm.com,tmoore@omm.com,iyanniello@omm.com,hleewong@omm.com,sbrown@omm.com
- **Ilann M. Maazel**  
imaazel@ecbalaw.com,ijohnson@ecbalaw.com
- **David Marroso**  
dmarroso@omm.com
- **Jill Ann Martin**  
jmartin@trumpnational.com,lvincent@trumpnational.com
- **Thomas R. Merrick**  
tmerrick@rgrdlaw.com
- **Maureen E. Mueller**  
mmueller@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Aaron M. Olsen**  
aaron@zhlaw.com,winkyc@zhlaw.com
- **Daniel M. Petrocelli**  
dpetrocelli@omm.com
- **Daniel Jacob Pfefferbaum**  
dpfefferbaum@rgrdlaw.com
- **Jeffrey J. Stein**  
JStein@rgrdlaw.com
- **Helen Irene Zeldes**  
helenz@zhlaw.com,winkyc@zhlaw.com

### Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

## Mailing Information for a Case 3:13-cv-02519-GPC-WVG Cohen v. Trump

### Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Xavier Jay Alvarez**  
jaya@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Brian E. Cochran**  
bcochran@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Patrick J Coughlin**  
patc@rgrdlaw.com,e\_file\_sd@rgrdlaw.com,susanm@rgrdlaw.com
- **Amber Lee Eck**  
ambere@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Kevin Eng**  
keng@mzclaw.com
- **Jason A Forge**  
jforge@rgrdlaw.com,llendzion@rgrdlaw.com,tholindrake@rgrdlaw.com,mbacci@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Gary B Friedman**  
GFriedman@flgllp.com
- **Jeffrey L. Goldman**  
jgoldman@bbwg.com
- **Alreen Haeggquist**  
alreenh@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Rachel L Jensen**  
rjensen@rgrdlaw.com,hbrown@rgrdlaw.com,e\_file\_sd@rgrdlaw.com,JayA@rgrdlaw.com,KLavelle@rgrdlaw.com,lmix@rgrdlaw.com
- **David Lee Kirman**  
dkirman@omm.com,awyman@omm.com,tmoore@omm.com,iyanniello@omm.com,hleewong@omm.com,sbrown@omm.com
- **Matthew R. Maron**  
mmaron@trumporg.com,carce@trumporg.com
- **Jill Ann Martin**  
jmartin@trumpnational.com,lvincent@trumpnational.com
- **Maureen E. Mueller**  
mmueller@rgrdlaw.com,e\_file\_sd@rgrdlaw.com
- **Aaron M. Olsen**  
aaron@zhlaw.com,winkyc@zhlaw.com
- **Daniel M. Petrocelli**  
dpetrocelli@omm.com
- **Daniel Jacob Pfefferbaum**  
dpfefferbaum@rgrdlaw.com
- **Kelli L. Sager**  
kellisager@dwt.com,VickyIsensee@dwt.com
- **Jeffrey J. Stein**  
JStein@rgrdlaw.com
- **WP Company LLC d/b/a The Washington Post**  
danlaidman@dwt.com

- **Alonzo Wickers , IV**  
alonzowickers@dwt.com, carolinasolano@dwt.com, ellenduncan@dwt.com, danlaidman@dwt.com
- **Helen Irene Zeldes**  
helenz@zhlaw.com, winkyc@zhlaw.com

### Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)