

Consolidated Appeals Nos. 07-56643, 07-56645, 07-56646, 07-56647,  
07-56649, 07-56650, 07-56651, and 07-56833

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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RYAN RODRIGUEZ, *et al.*,

*Class Plaintiffs-Appellees,*

*and*

WEST PUBLISHING CORPORATION, a Minnesota Corporation, *et al.*,

*Defendants-Appellees,*

v.

GEORGE SCHNEIDER, *et al.*,

*Objectors-Appellants.*

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*Appeal From Judgment Entered By  
The United States District Court, Central District of California,  
Manuel L. Real, District Court Judge  
U.S. District Court Case No. CV-05-03222-R*

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**BRIEF OF DEFENDANTS-APPELLEES  
WEST PUBLISHING CORPORATION AND KAPLAN, INC.**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee West Publishing Corporation states that it is a wholly-owned subsidiary of Thomson Reuters, which is a subsidiary of Thomson Reuters Corporation (a Canadian company) and Thomson Reuters PLC (a U.K. company). BAR/BRI is a division of West Publishing Corporation.

Dated: May 27, 2008

Respectfully submitted,

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Kaplan, Inc. states that it is a wholly-owned subsidiary of The Washington Post Co.

Dated: May 27, 2008

Respectfully submitted,

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## **JURISDICTIONAL STATEMENT**

Pursuant to Ninth Circuit Rule 28-2.2, Appellees agree with the statement regarding the District Court’s jurisdiction, and the jurisdiction of this Court, recited in the Brief for Objectors-Appellants Robert Gaudet, Jr., et al. (“Gaudet”) at 1.

## **STATEMENT OF ISSUES**

1. Whether the District Court acted within its discretion in approving the Stipulation and Settlement Agreement (“Settlement”) in this case as fair, adequate, and reasonable.
2. Whether the District Court acted within its discretion in approving the Settlement in this case without unsealing certain documents.
3. Whether the District Court acted within its discretion in approving the *cy pres* provision of the Settlement in this case.

## **STATEMENT OF THE CASE**

This is an appeal from a September 10, 2007 Final Order and Judgment of the United States District Court for the Central District of California, Real, J., approving, pursuant to Fed. R. Civ. P. 23(e), settlement, for \$49 million and non-monetary relief, of claims alleged initially in a class action complaint filed on April 29, 2005. Schneider, *et al.* Joint Excerpts of Record (“ER”) 1.

Defendants in the District Court, Appellees here, are Kaplan, Inc. (“Kaplan”) and West Publishing Corporation (“West Publishing”). Kaplan is the

well-known provider of test preparation courses, particularly, in connection with this case, for the Law School Admission Test, or LSAT. West Publishing is a wholly-owned subsidiary of Thomson Reuters. West Publishing's division BAR/BRI, the national provider of preparation courses for the bar exams of the various states, was the focus of the allegations in the initial complaint and a later filed First Amended Class Action Complaint. Defendants-Appellees West Publishing Corporation and Kaplan, Inc.'s Supplemental Excerpts of Record ("SER"), filed herewith, at 2, 5, 7, 11–15 (First Amended Class Action Complaint ("Complaint") ¶¶ 2, 17, 26, 37–44).

Over Appellees' opposition, on May 15, 2006, the District Court certified a national class consisting of "[a]ll persons who purchased a bar review course from BAR/BRI in the United States from August 1997 to the present" (the "Class"). SER 465 (Order Granting Motion for Class Certification). Appellees sought review of the District Court's certification order, but this Court declined to entertain that petition. District Court Docket Entry ("DE") 199. The Class includes approximately 376,000 individual members. SER 202, 217 (Declaration of Richard L. Sartory dated June 8, 2007 ¶ 5a, Exh. 3 (Affidavit of Charlene Young dated May 4, 2007 ¶ 7)).

The Class alleged that Appellees unlawfully agreed to divide certain markets in violation of Sherman Act Section 1. SER 11, 20–21 (Complaint ¶¶ 37,

64–66). The Class also alleged that BAR/BRI unlawfully acquired the assets of an alleged competitor in violation of Clayton Act Section 7 and that BAR/BRI had unlawfully acquired and maintained a monopoly in the bar review business in violation of Sherman Act Section 2. SER 11, 19, 22 (Complaint ¶¶ 38, 58, 71–72).

The parties took 32 fact and expert depositions and produced more than 400,000 pages of documents. ER 34 (Opinion and Order (“Opinion”) at 2); ER 72–74 (Findings of Fact and Conclusions of Law (“Findings”) ¶¶ 8–10). During the course of discovery, the parties had multiple, rancorous discovery disputes that resulted in appointment of a Special Discovery Master. ER 34 (Opinion at 2); ER 74 (Findings ¶ 11).

After the close of discovery, Kaplan moved for summary judgment with respect to the Class’s Section 1 claim. ER 35 (Opinion at 3); ER 75 (Findings ¶ 19). The District Court denied that motion without opinion on September 18, 2006. ER 35 (Opinion at 3); ER 75 (Findings ¶ 19). BAR/BRI informed the District Court of its intent to move for summary judgment before trial. ER 95 (Findings ¶ 79) (noting that if the litigation had continued, “Plaintiffs would also have [had] to oppose BAR/BRI’s motion for summary judgment.”).

With an early 2007 trial date approaching, in November 2006 the parties initiated what would prove to be lengthy and contentious arms-length settlement negotiations, under the supervision of the Hon. Daniel A. Weinstein

(Ret.), a respected mediator. SER 156–57 (Declaration of Honorable Daniel Weinstein (Ret.) in Support of Plaintiffs’ Motion for Order Granting Final Approval of Class Action Settlement (“Weinstein Decl.”) ¶¶ 5–8); ER 35 (Opinion at 3); ER 75 (Findings ¶¶ 20–21). Judge Weinstein noted that Class Counsel sought the “maximum substantive relief” and also insisted on non-monetary relief to promote competition. SER 157 (Weinstein Decl. ¶¶ 6, 7). Ultimately, on February 2, 2007, the parties executed a Stipulation and Settlement Agreement. ER 36 (Opinion at 4); *see also* SER 84 (Settlement). Judge Weinstein commented that, in his view as an experienced mediator, the negotiated terms were “fair, reasonable and adequate in light of the strengths and weaknesses of the claims and defenses and the risks of establishing liability and damages.” SER 157–58 (Weinstein Decl. ¶ 9). On February 26, Class Counsel moved for preliminary approval of the Settlement. DE 243.

The District Court held a hearing on that motion on March 19, 2007. DE 258. By that time, it had become clear that three representative plaintiffs objected to the settlement, while the four other representative plaintiffs supported the Settlement. SER 185 (Order Granting Motion for Preliminary Approval of Class Action Settlement and Directing Dissemination of Notice to the Class (“Preliminary Approval Order”) at 1). The District Court granted preliminary approval, following which the Class was notified of the Settlement, its terms and

the process that the District Court would follow in connection with Class Counsel's motion to approve the Settlement. *Id.*

The District Court convened hearings on June 18 and July 9, 2007 to address the fairness and adequacy of the Settlement. ER 1 (Final Order at 1). The District Court heard from all objectors who appeared, called for additional briefing with regard to aspects of the Settlement and thereafter issued its Findings of Fact and Conclusions of Law, as well as its Opinion and Order approving the Settlement as fair, reasonable and adequate. *See* ER 5–6 (*id.* at 5–6); *see also* ER 36 (Opinion at 4). In connection with this process, Appellees advised the District Court that notice had been provided to the state attorneys general and the U.S. Attorney General, none of whom opposed the Settlement. SER 160 (Declaration of James P. Tallon Regarding the Class Action Fairness Act ¶¶ 3–6); SER 169 (Revised Declaration of Lee S. Taylor in Support of Motion for Final Approval of Settlement, Regarding Kaplan's Compliance with the Requirements of the Class Action Fairness Act ¶¶ 2–4). The District Court entered its final judgment on September 10, 2007. ER 1 (Final Order).

Certain objectors moved for additional findings of fact on September 20, 2007, while other objectors moved for awards of attorneys' fees. *See* DE 436, 441, 442, 443; *see also* ER 183. The District Court denied these motions (DE 458, 466; *see also* ER 128, ER 137) and this appeal followed.

## STATEMENT OF FACTS

This case deals with the business of bar examination preparation courses. SER 7 (Complaint ¶¶ 24, 26). BAR/BRI is a recognized provider of such courses in every state of the United States.

The Class's claims focused on one of BAR/BRI's competitors, West Bar Review ("West Bar"). SER 2, 9–10 (Complaint ¶¶ 1–3, 33–34). West Bar was launched by West Publishing in 1995 and, after incurring losses of more than \$26 million in two years, was shut down by West Publishing in 1997. SER 33, 37 (Answer and Affirmative Defenses of Defendant West Publishing Corporation ("West Answer") ¶¶ 1, 34, 38); *see also* SER 315 (Defendant West Publishing's Reply to Plaintiffs Ryan Rodriguez, Loredana Nesci, and Lisa Gintz's Objection to Preliminarily Approved Settlement and Conditional Motion for Bifurcation of Certain Liability Issues at Trial ("Reply to Rodriguez Objection") at 2). During this period, BAR/BRI was owned by Harcourt General, Inc.<sup>1</sup>

West Bar's ambitious beginnings in 1995 were characterized by an attempt to do business in nearly every state, either by acquiring existing bar review course providers or through start-up operations. SER 1, 8, 9 (Complaint ¶¶ 1, 29,

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<sup>1</sup> West Publishing was acquired by The Thomson Corporation ("Thomson") in 1996. SER 10 (Complaint ¶ 34). In 2001, four years after West Publishing shut down West Bar, Thomson acquired Harcourt General's higher education business, which included BAR/BRI. SER 35 (West Answer ¶ 16). Thomson's acquisition of Harcourt General's higher education business was not at issue in the District Court.

33). This was a costly business plan; by April 1997, West Bar had lost \$26 million and was projected to lose an additional \$21 million by year-end 1999. SER 315 (Reply to Rodriguez Objection at 2).

By the summer of 1997, West Publishing was winding down West Bar's costly and unprofitable operations. SER 10, 11 (Complaint ¶¶ 34, 38). Kaplan expressed an interest in acquiring West Bar (SER 80 (Declaration of Andrew S. Rosen in Support of Defendants' Motion to Transfer Venue to the Southern District of New York ("Rosen Decl.") ¶ 3)); SER 52 (Kaplan Inc.'s Answer to First Amended Complaint ("Kaplan Answer") ¶ 37)), but after conducting due diligence, Kaplan determined in early August 1997 to forego the acquisition. SER 11 (Complaint ¶ 37). West Publishing shut down West Bar completely in mid-August. SER 315 (Reply to Rodriguez Objection at 2); *see also* SER 11 (Complaint ¶ 38).

Although West Bar discontinued operations in mid-August 1997, it nevertheless remained responsible to provide bar review courses to pre-registered customers. SER 315 (Reply to Rodriguez Objection at 2); *see also* SER 11 (Complaint ¶ 38). To address these obligations, West Publishing initially offered full refunds or alternative home-study bar review courses. SER 315 (Reply to Rodriguez Objection at 2). Customers reacted negatively to these offers; some

threatened boycotts of West Publishing products and class-action litigation. SER 315 (Reply to Rodriguez Objection at 2).

To address these complaints, West Publishing contracted with BAR/BRI to offer bar review courses to West Bar pre-registered customers at the price originally quoted by West Bar. SER 315 (Reply to Rodriguez Objection at 2). West Publishing agreed to pay BAR/BRI a fee for each pre-registered West Bar customer who enrolled in a BAR/BRI course, to transfer three copies of West Bar's course materials and associated intellectual property rights to BAR/BRI and also to transfer to BAR/BRI some trade names associated with West Bar's defunct operations. SER 315–16 (*id.* at 2–3). BAR/BRI did not acquire West Bar's stock or facilities, did not assume West Bar's lecturer or student contracts, did not hire West Bar's staff or acquire West Bar's goodwill or accounts receivable. SER 316 (*id.* at 3); *see also* ER 104 (Findings ¶ 103(c)).

In late October 1997, well after West Bar had shut down, BAR/BRI and Kaplan executed a “Co-Marketing Agreement” after concluding negotiations that commenced after Kaplan decided that it would not acquire West Bar. SER 80 (Rosen Decl. ¶ 4). The Co-Marketing Agreement provided that Kaplan would market BAR/BRI to Kaplan's LSAT students, *i.e.*, persons planning to attend law school. SER 10, 11 (Complaint ¶¶ 36, 38). Both BAR/BRI and Kaplan perceived that Kaplan's LSAT students were a natural audience for marketing BAR/BRI

which, as part of its business practices, attempts to sign-up first year law students to take its bar review courses after completing law school. Complaint ¶ 30. The Co-Marketing Agreement specified Kaplan’s marketing services and what it would be paid. ER 93 (Findings ¶ 73).

From these events, the Class conjured the speculative claim that Kaplan and BAR/BRI had agreed that Kaplan would forego acquisition of West Bar and stay out of the bar review business in exchange primarily for payments to be made by BAR/BRI via the Co-Marketing Agreement. SER 2–3, 11 (Complaint ¶¶ 4, 37). Plaintiffs also claimed that BAR/BRI had diminished competition through its agreement with West Publishing (SER 19 (*id.* ¶ 58)) and that BAR/BRI had created and maintained an unlawful monopoly in the bar review business. SER 22 (*id.* ¶ 72).

### **SUMMARY OF THE ARGUMENT**

The District Court approved the Settlement only after a thorough hearing, based on its knowledge of the case and in light of the respected mediator’s corroborating opinion that the Settlement was “fair, reasonable and adequate in light of the strengths and weaknesses of the claims and defenses and the risks of establishing liability and damages.” SER 157–58 (Weinstein Decl. ¶ 9). The District Court acted well within its discretion.

The District Court was aware through its stewardship of the case that the parties had thoroughly and vigorously litigated the issues from beginning to end. The District Court was aware that the parties had sharply different perspectives regarding the merits of the Class's claims and Appellees' defenses. This Circuit's precedent did not require the District Court to consider expressly potential treble damages that the Class would have sought *if* the Class had proved liability, particularly in light of the significant variances in the parties' damages analyses and the multiple flaws in the anticipated testimony of the Class's damages witness. Indeed, this Court should not adopt a rule that the district courts of this Circuit must expressly consider potential treble damages in the context of assessing an antitrust class action settlement pursuant to Fed. R. Civ. P. 23(e). Such a rule is not necessary in light of this Circuit's multi-factor framework for assessing class settlement nor would such a rule serve valid policy objectives.

It was a valid exercise of discretion when the District Court decided that it did not need to abrogate its valid protective order and post Appellees' competitively sensitive documents to the Internet, as urged by Gaudet. The Class representatives, including those who objected to the Settlement, as well as a number of objecting Class members, had access to Appellees' confidential material as a result of reaching agreement with Appellees regarding such access; only Gaudet refused even to confer about a practical resolution. In light of Gaudet's

unwillingness even to discuss an accommodation, the District Court's exercise of its role in the interests of the Class and Gaudet's failure to preserve the issue for appeal, there is no basis to find a clear abuse of discretion.

The District Court's final approval of the Settlement should be affirmed.

## **ARGUMENT**

### **I. Standard of Review**

The District Court's conclusion that the Settlement is fair and adequate may be reversed only on a clear showing that the District Court abused its discretion. *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). Because the District Court carefully reviewed all aspects of the Settlement in light of (a) its familiarity with the Class's claims and the Appellees' defenses; and (b) the relevant factors articulated in this Circuit's precedent, the District Court acted well within the scope of its considerable discretion in approving the Settlement. Its judgment should be affirmed.

### **II. The Class Faced Strong Factual and Legal Defenses to Liability as well as Significant Problems with Its Damages Theory and Therefore Was Very Far from Prevailing at Trial**

Certain Appellants contend that the Settlement is not fair and adequate because, measured against the perceived strength of the Class's claims, neither the monetary nor the non-monetary attributes of the Settlement sufficiently reward the

Class. *See, e.g.*, Brief for Objectors-Appellants James Juranek, Audrey Juranek and Richard P. LeBlanc (“Juranek”) at 16–23; Brief of Appellant Pamela Collins (“Collins”) at 12–18. Appellants’ sweeping assertions regarding the strength of the Class’s case are not anchored in a serious assessment of the merits.

A. The Class’s Section 1 Claim Suffered from a Lack of Supporting Evidence

The Class asserted three causes of action in their First Amended Class Action Complaint. The principal claim to which Class Counsel devoted their attention in the District Court, that drove their discovery and that was the focus of the Class’s expert reports, was the claim that Kaplan and BAR/BRI had unlawfully agreed to allocate markets in violation of Sherman Act Section 1. In essence, the Class alleged that, in early August 1997, Kaplan agreed with BAR/BRI that Kaplan would abandon a potential purchase of the remnants of West Bar, a failed competitor of BAR/BRI, and stay out of the bar review business. SER 11 (Complaint ¶ 37). In exchange, the Class alleged, BAR/BRI agreed to pay Kaplan using the cover that Kaplan was paid for marketing BAR/BRI to LSAT students pursuant to the Co-Marketing Agreement. *Id.* The Class also alleged that BAR/BRI agreed to shut down a small test preparation business it had operated, thus ceding that market to Kaplan. SER 11 (*id.* ¶ 38).

The Class faced significant hurdles in attempting to prove the alleged agreement. Fundamentally, no knowledgeable witnesses supported the Class’s

version of events. SER 270–71 (Defendants’ Combined Response to Various Class Members’ Objections to Stipulation and Settlement Agreement (“Combined Response to Objectors”) at 10–11). To the contrary, Kaplan and BAR/BRI witnesses denied any such agreement. *Id.* Kaplan argued at length that, in pre-acquisition due diligence, it determined that West Bar not only had already lost millions of dollars but also that West Bar would continue to lose millions of dollars before it made money—if it ever did. ER 93 (Findings ¶ 73). Thus, ample evidence supported the conclusion that Kaplan’s decision to forego acquisition of West Bar was the product of Kaplan’s independent business judgment that the deal made no financial sense. Following Kaplan’s decision, West Publishing shut down money-losing West Bar entirely. SER 315 (Reply to Rodriguez Objection at 2); *see also* SER 11 (Complaint ¶ 38).

The Class took the position in the District Court that the Co-Marketing Agreement between BAR/BRI and Kaplan, agreed to on October 31, 1997, constituted key evidence of the unlawful market allocation agreement between Appellees. SER 11 (Complaint ¶ 37). This contention was belied by the fact that the Co-Marketing Agreement did not include provisions consistent with the Class’s theory, but did include multiple provisions specifying how Kaplan would market BAR/BRI to Kaplan’s customers—students preparing for the LSAT. BAR/BRI and Kaplan both saw Kaplan’s LSAT students—all of whom intended to

go to law school—as the perfect audience to which to direct a marketing pitch for BAR/BRI’s bar review courses because BAR/BRI seeks to enroll first year law students in BAR/BRI’s post-law school bar review courses. Complaint ¶ 30. Indeed, the Class’s own witnesses agreed that this marketing approach had value because it provided prospective law students an early introduction to BAR/BRI.

Significantly, the Class could never satisfactorily explain why Kaplan would have elected to forego the purchase of West Bar—particularly if it was as valuable as the Class claimed—and also would have agreed to stay out of the bar review business for the relatively modest payments for services Kaplan earned as a result of the Co-Marketing Agreement. Likewise, the Class never effectively countered evidence that BAR/BRI had been winding down its standardized test preparation business long before the summer of 1997 due to low enrollments and consequent unprofitability.

In sum, the Class’s Section 1 theory suffered from multiple defects that made it far less than certain that the Class would have prevailed at trial.

**B. Neither the Class’s Clayton Act Section 7 Claim Nor Its Sherman Act Section 2 Claim Was Factually or Legally Adequate or Even a Focus of the Class During Discovery**

The Class faced additional meaningful defects with respect to their two other causes of action, which were pleaded only against BAR/BRI. With regard to the Class’s Clayton Act Section 7 claim, the Class averred that BAR/BRI

had acquired West Bar's assets and therefore had eliminated or reduced competition in the bar review course business. SER 11, 19 (Complaint ¶¶ 38, 58). In fact, in making this claim, the Class continually overlooked undisputed material facts. First, West Publishing had shut down West Bar in mid-August 1997. SER 315 (Reply to Rodriguez Objection at 2); *see also* SER 11 (Complaint ¶ 38). By the time BAR/BRI contracted with West Publishing, West Bar was out of the competitive picture and consequently, nothing that BAR/BRI and West Publishing agreed to had any impact whatsoever on competition. SER 318–19 (Reply to Rodriguez Objection at 5–6).

Second, the heart of the contract between BAR/BRI and West Publishing was that BAR/BRI would provide bar review courses to students who had pre-registered with West Bar before it failed, at no increase in price to the students. SER 317 (*id.* at 4). This contract was pro-competitive rather than anticompetitive; BAR/BRI provided a service to West Bar's pre-registered consumers. Similarly, West Publishing's transfer to BAR/BRI of three copies of West Bar's course materials was competitively neutral, because BAR/BRI did not come into possession of scarce resources—the content of West's bar course outlines was in the public domain. SER 320 (*id.* at 7).

Third, the Class never explained why their Section 7 claim attacking the 1997 contract between BAR/BRI and West Publishing was not barred by the

passage of time. The Class did not allege that this agreement was concealed, nor could it in light of the public substitution of BAR/BRI courses for West Bar courses. The foregoing notwithstanding, the Class did not file their Section 7 claim until April 2005, long after the relevant limitations period expired and laches had attached. *See* *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000); *see also* *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 926, 928 (9th Cir. 1975) (recognizing a four-year limitation on equitable relief under Section 16 analogous to that applying to damages under Section 4). In short, the Class's Section 7 claim was riddled with fatal flaws.

Lastly, the Class devoted little attention during discovery to their claim that BAR/BRI had acquired or maintained an unlawful monopoly in the bar review business. The Class based this claim on allegations of scattered BAR/BRI conduct, including allegations that BAR/BRI competed unfairly by offering scholarships to students and was responsible for "tearing down" advertising posters that competitors placed on law school bulletin boards. SER 14–15 (Complaint ¶ 44). Needless to say, in response to these and other allegations, BAR/BRI was prepared to demonstrate at trial that its business was built not on anticompetitive

conduct, but rather on a superior product that has enjoyed wide consumer acceptance.

Moreover, BAR/BRI would have submitted fact and expert evidence at trial that there are no barriers to entry into the bar review business, thus rendering any market share advantage held by BAR/BRI legally insignificant in light of the disciplinary risk of new entry on BAR/BRI's ability to raise prices. *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990). This Court already said as much when it held, in *American Professional Testing Service v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, that BAR/BRI's market share was insufficient to establish monopoly power absent evidence of barriers to new entry or expansion. 108 F.3d 1147, 1154 (9th Cir. 1997) (noting that "the existence of 29 bar review courses in California suggests that any barriers to entry may not be that significant").

In sum, Appellants' one-sided, glowing depiction of the Class's chances of success at trial is dramatically overstated. By contrast, the District Court's assessment, based on nearly two years of active litigation, must be respected.

C. Appellants Incorrectly Assume that Key Issues Would Be Resolved in Favor of the Class

In their enthusiasm for the Class's claims, Appellants also overlook critical, contested issues—market definition and suitability of class certification. The District Court's analysis was not so cursory.

Regarding market definition, Appellees are of the strongly held view that the geographic dimension of the bar review business is local, not national, as the Class had contended. Bar review courses of the sort at issue here are generally offered in classrooms or meeting rooms to which students must travel. In this Circuit, the relevant geographic market for goods and services that require consumers to travel to the vendor is local, usually limited to a county or less. *See, e.g., County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001). Applying this test, Appellees submit that the relevant geographic markets could have been defined at trial around the cities in which BAR/BRI offers its classroom-based courses, not a single national market. In turn, the Class would have had to offer proof regarding the elements of their causes of action with respect to each relevant market, which Appellees believe the Class was not prepared to do.

Moreover, the Class as certified by the District Court implicitly depended on a single national market, notwithstanding Appellees' position that the bar review business is characterized by multiple local markets. Appellees had

argued to the District Court—and would have argued again on appeal from any adverse judgment—that, due to the multiple local markets at issue, a market-by-market analysis of liability, antitrust impact and damages would have overwhelmed common proof, thus rendering class certification inappropriate. SER 236–44 (Class Certification Hr’g Tr. at 5:20–13:10).

D. *If the Class Had Proved Liability, It Was Not Likely the Class Would Prove Damages, Certainly Not at the Level Posited by Its “Expert” Witness*

For all these reasons, it is far from certain that plaintiffs would have prevailed at trial. Put another way, there was a sound basis for meaningful disagreement whether the Class would prove liability, a basis with which the District Court was quite familiar. ER 50 (Opinion at 18). Moreover, had the Class proved liability, Appellees submit that a rational jury would have disregarded the Class’s damages theory or at least discounted it substantially. Indeed, Appellees submit that the District Court would not have allowed the Class’s damages expert to testify at trial in the wake of Appellees’ planned *Daubert* motion.

The Class’s witness regarding damages was Douglas F. Greer, an economics professor at San Jose State University. Greer rendered a damages report that was riddled with errors and methodological flaws, so much so that, following initial submission of his report, Greer amended it twice in three weeks to correct mistakes. That said, even Greer did not endorse the hyper-inflated

damages allegations of the Class’s complaint, on which some Appellants base their arguments. Collins at 17.

The District Court had Greer’s report as well as the competing analysis of Appellees’ expert economist, Daniel L. Rubinfeld, the Robert L. Bridges Professor of Economics at the University of California at Berkeley and former Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. Greer posited that the Class sustained overcharge damages in the range of \$158 million to \$168 million. ER 45 (Opinion at 13). Rubinfeld identified at least four critical flaws in Greer’s estimate. *See* SER 262–67 (Combined Response to Objectors at 2–7); *see generally* SER 224 (Declaration of Lee S. Taylor Authenticating and Attaching Documents (“Taylor Expert Decl.”) ¶¶ 2–4, Exs. A–C). For purposes of analysis, Rubinfeld used Greer’s methodology to re-calculate damages while correcting for Greer’s flaws. SER 263 (Combined Response to Objectors at 3). Rubinfeld determined that Greer’s corrected damages model yielded class-wide damages much less than \$10 million. *Id.*; *see also* ER 97 (Findings ¶ 83). Indeed, as set forth more fully below, even if liability were assumed, Rubinfeld’s solid analysis established that Class damages, even if trebled, would have been less than half the Settlement amount.

Greer’s report was, Appellees submit, beyond correction. Greer purported to calculate an overcharge by state, by year. SER 262 (Combined

Response to Objectors at 2). However, in a number of states in certain years, he determined that the alleged overcharge was zero—no overcharge. *Id.* In some instances, he determined that the alleged overcharge was negative—that certain class members were charged less than he thought they should be. *Id.* Neither of these oddities was consistent with Greer’s view that all Class members were damaged.

Greer generated his damages model by adopting as his benchmark the average actual price that BAR/BRI charged students in May–July 1997. SER 263 (*id.* at 3). He deemed these prices competitive because West Bar was still in business then. SER 262 (*id.* at 2). Greer also determined that BAR/BRI had a 2% operating profit in fiscal 1997 (which Greer deemed adequate) so that the average actual price in May–July 1997 provided BAR/BRI a suitable profit. *Id.*

Based on these assumptions, Greer projected “but for” prices through 2006. SER 263 (*id.* at 3). In each year, Greer increased BAR/BRI’s May–July 1997 prices, but only by an assumed rate of inflation. SER 262 (*id.* at 2). Greer’s model assumed that West Bar would have been in business throughout this period and that therefore BAR/BRI would not have raised its prices for ten years except to account for inflation. SER 263 (*id.* at 3). Greer then arrived at his estimated overcharges by subtracting his “but for” prices from the actual prices paid by Class members. *Id.*

Appellees and Appellees' expert economist identified numerous significant analytical flaws, incorrect factual assumptions and plain mistakes in Greer's report. SER 262–67 (*id.* at 2–7). For purposes of this appeal, Appellees will summarize one of these.

Greer justified his decision to use BAR/BRI's actual average prices for May–July 1997 as the benchmark with the “fact” that BAR/BRI had a 2% operating profit in fiscal 1997. SER 263 (*id.* at 3). This was wrong. Before management charges, the business division that included BAR/BRI attained just a 1.9% operating profit for fiscal 1997. *Id.* After management charges, most of which were allocable to BAR/BRI, the division operated at a loss. *Id.* Greer should have increased his benchmark price—and therefore reduced his damages estimate—simply to permit BAR/BRI to reach Greer's approved level of 2% operating profit. SER 264 (*id.* at 4).

More important, Greer overlooked or ignored that BAR/BRI's May–July 1997 prices were 16% lower than BAR/BRI's actual average prices for the entire year. *Id.* Had BAR/BRI's actual average prices for the entire year been equivalent to the May–July prices, BAR/BRI would have sustained a significant operating loss for the year, before management charges. *Id.* Clearly, Greer should have increased his benchmark price—and therefore reduced his damages

estimate—based on his conclusion that BAR/BRI should earn at least a 2% operating profit. *Id.*

By contrast with Greer, Professor Rubinfeld concluded that the Class sustained no antitrust injury or damages. ER 96–97 (Findings ¶ 83). He also concluded that, if he made certain assumptions contrary to his analysis and indulgent to the Class for the sake of argument, any damages sustained by the Class would have been limited in duration to three years in five states. SER 266 (Combined Response to Objectors at 6). Based on this lenient approach, Professor Rubinfeld determined that a multiple regression showed that Class damages, although overstated, would amount to approximately \$7 million. ER 97 (Findings ¶ 83). In other words, Class damages, even trebled, would have been less than half the Settlement, assuming the Class proved liability.

In sum, Greer’s damages estimate was so error-driven as to make it highly unlikely that any rational jury would have awarded damages anywhere near the level that Greer suggested, if the jury found liability. Because the District Court had Greer’s report and Rubinfeld’s reports at hand, the District Court’s conclusion that the Settlement was both fair and adequate was well within its sound discretion.

### III. The Settlement Is Fair and Adequate

Against this backdrop, it is clear that Appellants' narrow view of the strength of the Class's case compares poorly with the District Court's more nuanced understanding. Having judged the Settlement in light of its knowledge and experience, the District Court exercised sound discretion in approving the Settlement.

#### A. The Settlement Provides Substantial Benefits to the Class

Notwithstanding Appellants' challenge that the Settlement is insufficient (*see, e.g.*, Collins at 10 (claiming that the Settlement is "grossly insufficient"); Juranek at 19–21 (claiming that the Settlement is "not fair, adequate, and reasonable to the Class")), the Settlement provides substantial monetary and non-monetary benefits to the Class.

##### 1. The Settlement Provides a Substantial Cash Benefit

The Settlement provides a substantial cash benefit to class members, unlike other class action settlements, in which class members receive discount coupons, vouchers, or merchandise. The Settlement creates a \$49 million settlement fund from which claimants will be paid *pro rata* based on the amount paid by each claimant for a BAR/BRI bar review course. SER 93–94 (Settlement ¶¶ 34–36). Appellees deposited the \$49 million into an interest bearing account on April 6, 2007. ER 96 (Findings ¶ 82). Thus, the Class also benefits from the

interest accruing on the \$49 million principal, even though the Class would not have been entitled to pre-judgment interest if they had prevailed at trial.

This cash settlement is tailored to the Class's theory of the case, which was that Class members paid too much for their courses due to anticompetitive conduct—in other words, an overcharge. The Class did not contend that the BAR/BRI bar review courses purchased by class members lacked any value; thus, the Settlement is consistent with the Class's theory and provides for payment to Class members on that basis.

Juranek argues that the cash portion of the Settlement is “dubious” and that “[t]he \$49 million is not really \$49 million” because administrative costs, attorneys' fees, and other expenses are deducted from that amount. Juranek at 20–21. This ignores the plain language of the Settlement. Courts routinely award attorneys' fees that are paid out of settlement proceeds. *See, e.g., Williams v. MGM Pathe Commcn's Co.* 129 F.3d 1026, 1027 (9th Cir. 1997) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480–81 (1980); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12.55 (4th ed. 2002) (noting that “fee awards in . . . antitrust . . . class settlements will normally be payable out of the common fund recovered” and “it is common that antitrust . . . case settlements usually [as with the Settlement in this case] . . . provide that the defendant's payment of the class recovery monies is full payment for all claims, including

attorneys' fees.”). Typically, attorneys' fees represent the bulk of the deductions from settlement proceeds before the net proceeds are distributed to class members, but as here, the amount of the fee award is committed to the discretion of the District Court. Deduction of attorneys' fees and settlement expenses from the Settlement in this case does not render the Settlement unfair or inadequate.

But by any measure, the cash portion of the Settlement is meaningful. The gross Settlement measures just about 30% of the high end of the range of damages posited by the Class's damages witness (\$168 million) and just about 10% of that value trebled. Similarly, the gross Settlement as well as the Settlement net of attorneys' fees and expenses exceeds the maximum possible Class damages calculated by Appellees' expert economist, *trebled*. On the level of actual distribution to Class members, based on the most recent data submitted to the District Court, *see* SER 220–22 (Declaration of Richard L. Sartory dated Sept. 28, 2007 (“Sept. Sartory Decl.”) ¶¶ 5–14), Class members could expect to be paid approximately \$275 per valid claim. Such a payment compares favorably with class settlements in which class members have been paid pennies or have received coupons or product vouchers.

## 2. The Settlement Provides Meaningful Non-Monetary Relief

The non-monetary relief provided by the Settlement is both important and consistent with what the Class sought to achieve as a result of their lawsuit.

The District Court noted this in its Findings of Fact and Conclusions of Law, observing that the non-monetary relief “addresses many of the concerns that prompted the filing of this lawsuit.” ER 98 (Findings ¶ 87).

First, the heart of the Class’s complaint was the allegation that the Co-Marketing Agreement between BAR/BRI and Kaplan violated the antitrust laws. As the District Court pointed out, through the Settlement “Plaintiffs achieved termination of the alleged non-competitive agreement which was the catalyst of this Action.” ER 110 (Findings ¶ 119 n.7 and accompanying text); ER 49 (Opinion at 17).

Second, the Settlement requires BAR/BRI to disclose on its student registration form that registration with BAR/BRI does not obligate students to take a BAR/BRI course when eventually they prepare for a bar exam. SER 94 (Settlement ¶ 38(b)). This provision addressed a specific grievance alleged by the Class in the course of litigation: that, by signing-up law students at an early stage in their law school careers, BAR/BRI was, in effect, frustrating competitor efforts to win students for their courses. Commenting on this aspect of the non-monetary relief, the District Court noted that the Settlement “removes a significant barrier to entry into the market by competitors, who would otherwise face the potentially overwhelming obstacle of trying to compete in a market with few available

customers for several years after entry.” ER 111 (Findings ¶ 119); ER 49 (Opinion at 17).

Third, the Settlement includes a statement by BAR/BRI “that it is committed to accurate advertising as required by the Lanham Act, the Federal Trade Commission Act and similar laws, regulations and rules.” SER 95 (Settlement ¶ 39). This provision was added to the Settlement at the Class’s insistence to promote competition. SER 157 (Weinstein Decl. ¶ 7). During discovery, Class Counsel devoted some attention to deposition testimony that BAR/BRI’s advertising was unfair or inaccurate. These charges fell outside the boundaries of the Class’s antitrust claims but nevertheless captured the attention of some of the Class’s lawyers. Consequently, this provision was added to the Settlement to address the concerns of Class Counsel.

Juranek contends that the non-monetary relief provided by the Settlement is “illusory,” arguing that it amounts to nothing more than “promises not to violate some federal law in the future” and “does not benefit the *Class*” itself. Juranek at 19–20 (emphasis in original). Notwithstanding this contention, Juranek also argues that “[t]he fact that that [*sic*] [Appellees] have capitulated to the exact relief requested by the Plaintiffs in this case [termination of the Co-Marketing Agreement] is the most compelling evidence possible of the strength of

Plaintiffs' claims." *Id.* at 17–18. Thus Juranek refutes his own argument that the non-monetary relief is “illusory.”

Each aspect of the non-monetary relief addresses an issue that the Class complained about and regarding which they sought relief. *See* SER 248–52 (Plaintiffs' Proposed Equitable Relief at 2–6). In Juranek's words, the Class sought this “exact relief” on behalf of the class. Juranek at 17. Consequently, the logical endpoint of the arguments made by Juranek is that the Class was not entitled to the forward-looking relief sought. While Appellees may have endorsed that proposition in the course of the litigation, the fact is that the Class was successful in negotiating these non-monetary relief provisions based on their case theory and strategy in the District Court. Appellees take these provisions seriously. The District Court was amply justified in its factual and legal findings that the non-monetary relief was meaningful.

B. The District Court May, in Its Discretion, Approve Settlement of an Antitrust Class Action without Expressly Taking the Availability of Treble Damages into Account

Appellant Gaudet argues that this Court should adopt an unprecedented black letter rule *requiring* district courts to assess the adequacy and fairness of settlements in private antitrust class actions strictly by measuring the settlement against the treble damages that prevailing plaintiffs might have won

after success at trial. Gaudet’s argument is flawed for multiple reasons and should be rejected.

1. The District Court Did Not Abuse Its Discretion

Gaudet incorrectly asserts that the District Court made a legal error requiring reversal. Gaudet at 17. The District Court followed established precedent in deciding that it would not speculate about treble damages that might be awarded to the Class, had the Class prevailed after trial. ER 48 (Opinion at 16). Although Gaudet criticizes the primary precedent on which the District Court relied, the Second Circuit’s decision in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), Gaudet does not and cannot point to any decision by this Court that rejects the pertinent holding of *Grinnell*. Numerous other courts outside of the Second Circuit have followed *Grinnell* in declining to measure antitrust class action settlements by the yardstick of potential treble damages. *See, e.g., In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, 2005 WL 2230314, at \*24 (D.N.J. Sept. 13, 2005); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 257 (D. Del. 2002) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 376 (D.D.C. 2002)); *In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979). *Grinnell* is also cited with approval in the leading treatise on class action law and practice. *See* 6 Conte & Newberg, *supra*, § 18.57 (“antitrust settlements are traditionally negotiated and compromised on the basis of

an estimate of single damages only, in contrast to treble damages”) (citing *Grinnell*). Thus, it was hardly an “error of law” for the District Court to follow a long-standing precept that originated with a respected Circuit Court and that does not conflict with the law of this Circuit.

Gaudet’s arguments to the contrary are hollow. The District Court was not required to take treble damages expressly into account for the reason that Congress chose to make treble damages automatically available to plaintiffs prevailing at trial (Gaudet at 18), *because the Class did not prevail at trial*. In fact, the Class acknowledged that the Settlement does not reflect an adjudication of Appellees’ liability. SER 109–10 (Settlement ¶ 81); ER 11 (Final Order ¶ 16). This is no basis to apply a Congressional policy applicable to victorious plaintiffs but not to settling plaintiffs.

Likewise, it does not aid Gaudet to argue that the District Court erred merely because this Court has neither adopted nor commented on *Grinnell*’s holding regarding treble damages. Gaudet at 18. And, contrary to Gaudet’s broad attack on *Grinnell*, this Court has followed *Grinnell*’s teachings. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir 1998).

It is also incorrect for Gaudet to claim that this Court’s decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), bears on this case. *Molski* simply does not stand for the proposition that a district court must or even should look to

treble damages in evaluating a proposed settlement in a private antitrust class action.

*Molski* concerned a class action brought pursuant to the Americans with Disabilities Act and California law. 318 F.3d at 941. The district court in *Molski* had certified a mandatory Fed. R. Civ. P. 23(b)(2) class. On appeal, the bulk of the *Molski* court's analysis was devoted not to evaluation of the settlement at issue based on comparison of the settlement with alleged damages, but rather to whether the district court abused its discretion in certifying a mandatory class. *Id.* at 943–55.

The *Molski* settlement provided for (a) certain injunctive relief; (b) payment to “named plaintiff Molski [of] \$5,000 to settle his individual claims;” (c) payment to “class counsel [of] \$50,000 for the services performed in connection with this case;” and (d) donations, totaling \$195,000, to eight different disability organizations in California. *Id.* at 944. The consent decree did not provide for individualized relief for absent class members. *Id.* In other words, absent class members would be bound by a settlement that provided essentially nothing to them.

Plainly, the *Molski* court was troubled by a settlement that stripped absent class members of legal rights without corresponding benefit. *Id.* at 950–51. But the legal issue decided by the *Molski* court was, contrary to Gaudet's

assertions, limited to the invalidity of a mandatory class that includes treble damages. *Id.* at 950. So *Molski* is not support for the proposition that a district court must take potential treble damages into consideration in conducting its Rule 23(e) analysis. *Molski* has nothing to do with this case.

Appellants’ extensive and selective quotation of two cases critical of *Grinnell* reinforces the fact that *Grinnell* continues to represent the standard approach to whether treble damages must be taken into account in assessing an antitrust class action settlement. In one of these two cases, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, the district court was critical of the fact that “courts generally do not consider . . . recovery of treble damages . . . in assessing the settlement.” Nevertheless, the court “follow[ed] the precedents”—*i.e.*, *Grinnell*—and ruled that, even judged against potential treble damages, the settlement at issue was “not unreasonable.” 216 F.R.D. 197, 210 n.30 (D. Me. 2003).

In *In re Auction Houses Antitrust Litig.*, District Judge Kaplan examined the *Grinnell* rule in an interesting—if academic—review of its pros and cons. No. 00 Civ. 0648 (LAK), 2001 WL 170792, at \*6–8 (S.D.N.Y. Feb. 22, 2001), *aff’d*, No. 01-7626 (L), 2002 WL 1758897 (2d Cir. July 30, 2002). Nonetheless, Judge Kaplan ultimately observed that the question is “arguable,” but “need not be answered in this case.” *Id.* at \*8. Thus, not only is Judge Kaplan’s

commentary plainly *dicta*, it is irrelevant because he was bound to follow *Grinnell* notwithstanding his personal perspective.

2. A Rule that District Courts Must Assess Treble Damages in Antitrust Class Action Settlements Would Be Bad Policy and Worse Practice

Gaudet criticizes *Grinnell* as badly reasoned, illogical and flawed.

Appellees submit that the real analytical failure is Gaudet's. Adoption of a new rule that district courts must expressly take potential treble damages into account would contravene this Circuit's multi-faceted, fact-specific standard for assessing class action settlements and create additional burdens for the district courts in this Circuit. Ultimately, such a black letter rule would not only promote form over substance, but also would be unnecessary. This Circuit's existing precedent already calls on district judges to examine class settlements by weighing a number of factors, including probability of success on the merits, a factor which subsumes the question of the extent of damages that might be awarded.

Appellees thus respectfully submit that this Court need not adopt the rule urged by Gaudet, not least because such a rule would impose an unnecessary restriction on what is by design a discretionary process rooted in the district courts' familiarity with the facts and circumstances of particular cases. It should be well within the district court's sound discretion to consider if and to what extent the

availability of treble damages influences evaluation of the adequacy and fairness of a class settlement.

3. The Settlement Approval Process Is One of Balancing Competing Factors, not of Applying Bright-Line Rules

The law of this Circuit requires district courts to consider a number of factors in evaluating a proposed class action settlement. *See Staton*, 327 F.3d at 959; *see also Molski*, 318 F.3d at 953; *Linney*, 151 F.3d at 1242 (quoting *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (citing, *inter alia*, *Grinnell*). These cases teach that the approval of a proposed class action settlement does not involve application of bright-line rules, but rather a balancing of the factors enumerated in these cases and others that are relevant to a particular situation. Accordingly, a district court's approval of a proposed settlement should not depend entirely on a single factor, but rather on a weighing of factors in light of the characteristics of each particular case.

The District Court presided over the entirety of this lengthy and contentious litigation. The District Court addressed a contested initial motion to transfer venue, a vigorously contested motion for class certification as well as a contested motion for summary judgment and multiple *ex parte* applications. Because the Class may have included the Court's law clerks, the District Court took upon himself all the work of reviewing the parties' submissions. DE 9. The

District Court presided over the preparations for trial, as well as the settlement process. Thus, it is objectively reasonable to conclude that the District Court became intimately familiar with the factual and legal contours of this case and indeed, the District Court expressly so noted in approving the Settlement. ER 50 (Opinion at 18).

Thus, by analyzing the Settlement according to this Circuit's existing precedent, the District Court used its unique knowledge of the case to evaluate, among other things, the likelihood that the Class would prevail and the extent of damages they might have proven. It would promote form over substance to require, in addition to the work invested by the District Court, a mechanical, rigid additional requirement that the District Court specify the precise probability that the Class would prevail and the treble damages that might be won.

4. Adoption of the Appellants' Proposed Rule Would Require District Courts to Speculate on the Amount of Damages

A rule that district courts in this Circuit must expressly take potential treble damages in antitrust class action settlements into account would also add burdens to the work of the district courts in a false quest to arrive at a pseudo-objective quantification. It is well understood that antitrust plaintiffs generally seek the maximum damages that the facts and expert analysis can justify. Conversely, antitrust defendants often offer rationales to demonstrate that, even if liability is proved, plaintiffs are not damaged or only modestly damaged.

In this case, the District Court had available the parties' expert damages reports. SER 223 (Taylor Expert Decl.). The Class's damages witness posited damages of between \$158 million and \$168 million for the entire Class *if* liability had been proven. ER 45 (Opinion at 13). In this the Class's damages witness did not himself endorse the Class's alleged damages. By contrast, Appellees' respected expert economist calculated that even if liability had attached, the Class had not sustained damages, at all. ER 97 (Findings ¶ 83).

Gaudet does not attempt to deal with these variances. Rather, Gaudet would assign undue weight to whatever aggressive damages calculation an antitrust plaintiff developed in order to punish the antitrust defendant. Nothing justifies such indulgent treatment of antitrust plaintiffs in the context of class action settlements. Indeed, at a trial in this case, a jury would have had the benefit of cross-examination of the Class's damages witness under oath and would have judged his damages calculation. While a jury would have been free to disregard the Class's damages case, Gaudet would have it that the District Judge should have been bound to it.

C. Even If the District Court Should Have Expressly Acknowledged the Availability of Treble Damages, It Was Harmless Error that It Did Not

Even if this Court were to adopt Gaudet's proposed bright-line rule and hold that treble damages should be expressly considered in evaluating the

settlement amount, appellees respectfully submit that the Settlement is still fair and adequate under that standard, and the District Court’s final approval should be affirmed. Under the Settlement, claimants may receive cash payments of up to 30% of the purchase price they paid for their BAR/BRI courses. *See* ER 76–77 (Findings ¶ 25).

Moreover, it has hardly been established that the Class would have proved liability and also proved damages as posited by its damages witness. Appellees may have persuaded a jury that the Class sustained no damages or no more than \$7 million in damages. ER 45 (Opinion at 13).

But in any event, contrary to Collins’s argument, relying on *Acosta v. Trans Union, LLC*, 240 F.R.D. 564, *superseded*, 243 F.R.D. 377 (C.D. Cal. 2007), that “where the economic benefit of a [settlement] is significantly less than the potential recovery, the [settlement] is unfair to Plaintiff” (Collins at 16–17), “[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney*, 151 F.3d at 1242 (quoting *Grinnell*, 495 F.2d at 455). Indeed, a number of cases in this Circuit approve settlements in which the cash compensation is a fraction of the claimed damages. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (settlement of \$2 million out of a potential \$12 million, or about 16%, was fair and

adequate); *Officers for Justice*, 688 F.2d at 628; *see also In re Omnivision Tech., Inc.*, No. C-04-2297 SC, 2007 WL 4293467, at \*5 (N.D. Cal. Dec. 6, 2007) (settlement at approximately 6% of potential recovery); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403 (C.D. Cal. June 10, 2005) (median amount recovered in settlement was 2.7% in 2002, 2.8% in 2003, 2.3% in 2004, 3% in 2005, and 2.2% in 2006); *see generally In re Plastic Tableware Antitrust Litig.*, No. Civ. A. 9403564, 1995 WL 678663 (E.D. Pa. Nov. 13, 1995) (3.5% recovery; collecting antitrust cases with similar or smaller percentages of recovery).

#### **IV. The District Court Did Not Abuse Its Discretion in Approving the Settlement without Making Public Appellees' Confidential and Competitively Sensitive Information**

Gaudet alone argues that the District Court's approval of the Settlement was improper because discovery and certain pleadings were subject to a protective order designed to protect Appellees' confidential and competitively sensitive information. Gaudet argues that the District Court should have posted the Appellees' confidential and competitively sensitive information to the Internet, where all class members (and, of course, all market participants) could access it. SER 388 (Gaudet Notice of Intention to Appear ("Gaudet Notice") at 6).

The District Court's prudent course may only be disturbed based on a "clear abuse of discretion." *Staton*, 327 F.3d at 960 (internal citation omitted)

(class action settlement approval); *see also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (decision denying request to modify a protective order reviewed for abuse of discretion). The District Court did not abuse its discretion for the following reasons.

First, every Class member who requested access to the confidential portions of the court file was offered access—conditioned only on agreement to be bound by the Stipulation and Protective Order (“Protective Order”) governing discovery in this case. SER 62 (Protective Order). Only Gaudet refused this offer, which satisfied the other Class members in connection with their evaluation of the Settlement. Moreover, the District Court’s approval process involved the unique circumstance in which one of the lawyers for the Class, Eliot Disner, initially supported the Settlement but later switched sides to argue against the Settlement. Disner had access to every single pleading, deposition transcript, expert report and discovery document in the case. In framing arguments against the Settlement purportedly on behalf of three objecting Class representatives, Disner was able draw on his extensive knowledge of the case, including knowledge based on confidential information. Thus, there is no reasonable argument that information critical to evaluating the fairness of the Settlement was hidden from the District Court.

Second, even if Class members and their counsel had lacked access to documents subject to the protective order, additional procedural safeguards were in place to ensure the fairness, reasonableness and adequacy of the settlement. The District Court, needless to say, had access to every filing in the litigation and could fully evaluate the Settlement based on all of the relevant evidence. In fact, the District Court made this very point in approving the Settlement. ER 50 (Opinion at 18).

Third, Gaudet failed to preserve this argument for appeal because his motion requesting that the District Court abrogate the Protective Order and delay the fairness hearing was untimely and otherwise procedurally improper.

A. Class Members and Counsel Who So Requested Got Access to the Confidential Pleadings

Every Class member who requested access to pleadings sealed pursuant to the Protective Order was offered access to that material and more, with only minimal redactions to protect against disclosure of Defendants-Appellees' most significant competitive plans. Moreover, all seven named Class representatives were authorized by the protective order to review "Confidential" documents, albeit not "Highly Confidential" documents. SER 66 (Protective Order ¶ 8). The named Class representatives who had access to confidential documents included the three who objected to the Settlement, Loredana Nesci, Ryan Rodriguez and Lisa Gintz. Nesci acknowledged in a March 5, 2007 declaration

that, beginning on January 15, 2007, she personally reviewed “the confidential pleadings in this case.” SER 363 (Defendants’ Further Opposition Exh. A at 35).

Nesci, Rodriguez and Gintz were represented as objectors by Eliot Disner, the attorney who took a lead role in the case throughout discovery and during the pre-trial phase of the litigation. *See, e.g.*, Opening Brief of Appellants Schneider *et al.* (“Schneider”) at 8 (“In late May of 2007, Eliot Disner, one of the principal plaintiffs’ attorneys in this case . . . began representing [Nesci, Rodriguez and Gintz].”). Disner saw every pleading and confidential document in the litigation. SER 296 (Memorandum of Points and Authorities re Lead Plaintiffs’ Ryan Rodriguez, Loredana Nesci and Lisa Gintz Objection to Preliminarily Approved Settlement and Conditional Motion for Bifurcation of Certain Liability Issues at Trial (“Bifurcation Motion”) at 1).

Further, Nesci, Rodriguez and Gintz, as well as counsel to all other Class members who requested access, were offered access to all substantive filings in the litigation and the entirety of key depositions in the litigation—including “Highly Confidential” documents—with very limited redactions. This access was conditioned only on agreement to maintain the confidentiality of the information in accordance with the terms of the Protective Order. Redactions were confined to Kaplan’s most highly confidential information relating to Kaplan’s competitively sensitive future plans with respect to bar review. SER 418 (Declaration of Lee S.

Taylor In Opposition To Motion To Unseal (“Taylor Unsealing Decl.”) ¶ 2, Exh. A (May 29, 2007 Letter) at 1).

Nesci, Rodriguez and Gintz, as well as objecting Class members David Harris, Kareem Kamal, Matthew Kavanaugh, Simon Newfield, Jonathan Ricasa, Abigail Treanor and David Zelenski accepted this offer and reviewed all of this confidential and highly confidential information. SER 419 (Taylor Unsealing Decl. ¶ 2, Exh. A at 2); SER 445 (Stipulation and Order Regarding Certain Class Members’ Attorney In Connection with the Stipulation and Protective Order Dated January 13, 2006).

No Class member who reviewed such confidential and highly confidential material asserted that the material was inadequate, or that the minimal redactions in those materials in any way interfered with the ability to evaluate the fairness of the Settlement. Moreover, no Class member who accepted this offer made any argument to the District Court in opposition to the Settlement that was meaningfully different from the arguments made by other objectors. Most importantly, *no Class member who accepted this offer appealed the District Court’s approval of the Settlement.*

Gaudet was offered access to the very same confidential information that other Class members reviewed (including all of the substantive sealed pleadings and key depositions) on the very same terms. SER 418 (Taylor

Unsealing Decl. ¶ 2, Exh. A). But Gaudet alone chose to spurn that offer. As Gaudet acknowledged in the District Court, Gaudet also ignored the requirement of the Local Rules to meet and confer in an attempt to resolve concerns before filing his motion to unseal. SER 452 (Ex Parte Application to Shorten Time to Bring Motion to Unseal Class Certification Briefs, Summary Judgment Briefs, and Expert Reports and to Delay Date of Proposed Settlement Hearing (“Gaudet Ex Parte”) at 2). Consequently, Gaudet cannot in fairness be heard to complain to this Court about the terms of an offer of access that Gaudet rejected out of hand without even attempting negotiation.

The Class was *not* deprived of the information necessary to evaluate the Settlement, nor did the District Court abuse its discretion in declining wholesale abrogation of the Protective Order, before determining whether to approve the Settlement. ER 50 (Opinion at 18) (finding objection based upon lack of access to confidential materials moot). *See Bank of Am. Corp. Sec. Litig.*, 210 F.R.D. 694, 706 (E.D. Mo. 2002) (due process satisfied where objectors who sought to review sealed documents were given access to those documents, provided that they agreed to be bound by the terms of a protective order).

**B. The Fairness of the Settlement Also Was Ensured by the District Court’s Independent Evaluation of the Record**

Even if Class members had not reviewed, or had not had the opportunity to review, materials subject to the Protective Order, the Class’s

interests were safeguarded by the District Court's independent review of the record. As the District Court stated:

[I]n its role as guardian for the class, this Court has had access to all of the pleadings filed by the parties, including those filed under seal pursuant to the Protective Order. The Court's access to and review of these documents throughout the pendency of this action precludes any contention that this Court is incapable of assessing the fairness, reasonableness or adequacy of the settlement. To the contrary, this Court is intimately familiar with the facts and legal theories in this matter.

ER 50 (Opinion at 18); *see also* 4 Conte & Newberg, *supra*, § 11.24 (quoting *Manual for Complex Litigation* (Third) § 30.41 (1995) (discussing this and other safeguards provided by the class action approval process)).

Gaudet has not proffered authority supporting the contention that a protective order must be abrogated before the fairness of a settlement can be considered. Appellees are not aware of any such authority. To the contrary, the Eighth Circuit has affirmed a district court's approval of a settlement where the district court reviewed *in camera* submissions related to the settlement's value but refused to disclose those submissions to class members. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 930–31 (8th Cir. 2005). The Eighth Circuit held that the objecting class members did not suffer prejudice as a result of the district court's *in camera* review because the sealed records were not critical to a determination of whether to object to the settlement. *Id.*

Here, as in *In re Wireless*, the District Court considered “all of the pleadings filed by the parties, including those under seal.” ER 50 (Order at 18). Just as in *In re Wireless*, these confidential pleadings were not critical to evaluation of the Settlement, as evidenced by the fact that no meaningful additional arguments were raised by those Class members who did review the confidential materials, none of whom appealed the District Court’s approval of the Settlement. Further, to the extent that some Class member review of the confidential materials was necessary in conjunction with the settlement process, it was more than sufficient that the various objecting Class members and their counsel, who requested the ability to review the materials, were given access to those materials. The wholesale abrogation of the Protective Order and posting to the Internet of competitively sensitive information from the litigation was neither necessary nor appropriate. *See also FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (“Once a confidentiality order has been entered and relied upon, it can only be modified if an ‘extraordinary circumstance’ or ‘compelling need’ warrants the requested modification.”) (quoting *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)).

Gaudet is mistaken in arguing that Rule 23’s notice requirement mandates that the District Court publicly disclose information properly subject to a protective order before determining whether to approve a proposed class action

settlement. In support of his argument, Gaudet relies on dictum in the Fifth Circuit's decision in *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008). *See* Gaudet at 45. No issue was raised in *High Sulfur* with respect to whether the district court should have made public all of the materials subject to a litigation protective order before considering whether to approve a proposed class action settlement.

Rather, *High Sulfur* concerned the propriety of the district court's award of attorneys' fees *after* a settlement had been properly approved. *Id.* The issue on appeal was whether the attorneys in the underlying action, who wished to contest their fee award, were entitled to see the data underlying the fees granted to other attorneys in the action. The *High Sulfur* decision, and the language upon which Gaudet relies, is irrelevant to the pending appeal both factually and procedurally.

The Settlement, which provides significant cash benefits to the Class, should not be disturbed based on the District Court's refusal to abrogate the protective order before assessing the fairness of the Settlement. In any event, it would be directly at odds with the central purpose of the antitrust laws—protecting competition—to make public defendants' competitively sensitive information as a cost of the Rule 23(e) process. Moreover, such a blanket disclosure would be contrary to the express recognition that courts should protect litigants'

competitively sensitive business information. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (the “right to inspect and copy judicial records is not absolute” and may be properly limited by the court to protect “sources of business information that might harm a litigant’s competitive standing”).<sup>2</sup>

C. Gaudet Failed to Preserve the Protective Order Issue

This Court should reject Gaudet’s argument regarding the District Court’s protective order for the additional reason that the argument was not properly preserved. The four Class member objectors led by Gaudet are attorneys well-versed in court procedures. Gaudet sought to file a motion to unseal without sufficient time for it to be heard before the date for the fairness hearing that had been scheduled and announced in the Class notice. In addition, Gaudet failed to comply with the Local Rules because Gaudet neither engaged in a meaningful meet and confer with Appellees nor certified compliance with the Local Rule. SER 452 (Gaudet Ex Parte at 2) (proposing to have motion to unseal heard on the date scheduled for the fairness hearing; also noting that the Gaudet “did not meet and confer”); SER 458, 461–62 (Gaudet Ex Parte at Gaudet Declaration ¶ 4, Exh. A (notice of underlying motion, also proposing hearing on the date scheduled for

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<sup>2</sup> The confidential materials here contain, for example, evidence of Kaplan’s deliberations and strategies about new business opportunities that have been maintained in confidence by Kaplan, including throughout the litigation. SER 441 (Declaration of Tammi Rice in Opposition to Motion to Unseal (“Rice Decl.”)); SER 409 (Kaplan, Inc.’s Opposition to Motion to Unseal (“Kaplan Opposition”)).

the fairness hearing, and lacking certification of meet and confer required by Local Rule 7-3)); ER 50 (Opinion at 18) (noting untimeliness of motion to unseal).

Furthermore, Gaudet's motion violated several other requirements set forth in the Central District of California's Local Rules governing civil motion practice.

The District Court never granted the Gaudet Objectors leave to file their untimely motion. Thus, while the District Court considered Gaudet's objections to the settlement, it did not consider the motion to unseal, which never was properly filed.

As lawyers, Gaudet was aware of the timing, as well as the meet-and-confer requirements that govern motions such as the one they sought to bring, and simply chose to disregard the Local Rules. This was meaningful because had a meet-and-confer been held, it is likely that the issues raised by the unfiled motion to seal would have been resolved, just as identical requests for access to sealed records were addressed to every other Class member's satisfaction.

#### D. The Unfiled Motion to Unseal Lacks Merit

Moreover, even had Gaudet's contemplated motion to unseal been before the District Court, the District Court did not abuse its discretion in refusing to lift the appropriately entered protective order. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002) (the decision to

modify, alter, amend, or lift an existing protective order is left to the discretion of the district court).

As an initial matter, Gaudet broadly and wrongly indicts the protective order governing this action as a prohibited “blanket” order. In making this argument, Gaudet relies on, *inter alia*, *Foltz*, 331 F.3d at 1122, and *Kamakana v. City of Honolulu*, 447 F.3d 1172 (9th Cir. 2006). Contrary to Gaudet’s contentions, the Protective Order in place in this case does not possess the characteristics of the so-called “blanket” order condemned in *Foltz*. Among other things, the order in this case (1) does not apply to all documents produced in discovery, irrespective of a particular designation by the parties in “good faith” that the documents indeed fell within the ambit of Rule 26(c)’s protections; (2) does not apply to all documents produced in discovery irrespective of whether they contained competitively sensitive information; (3) does provide for access to key documents by stakeholders in the litigation; and (4) has a “two-tiered” approach to differentiate distinguishable levels of confidentiality among sensitive documents. SER 62 (Protective Order). *Cf. Foltz*, 331 F.3d at 1131.

Additionally, Gaudet, again relying on *Foltz*, 331 F.3d at 1122, and *Kamakana*, 447 F.3d at 1172, as well as *Pintos v. Pac. Creditors Ass’n*, 504 F.3d 792 (9th Cir. 2007), and *Phillips*, 307 F.3d at 1206, argues that the District Court erred by failing to make a finding that “good cause” justified the protection of each

sealed document in the record. While these cases do support the general notion that “good cause” must justify the sealing of each and every document designated as “confidential” under a protective order, they do not support the notion that the District Court must make a specific finding of such good cause on the record with respect to every document a party seeks to file under seal. Rather, the District Court only is obligated to conduct such an in-depth “good cause” analysis if a protective order is challenged as to the particular records a movant has sought to unseal. *See, e.g., Foltz*, 331 F.3d at 1131 (“Now that the Private Intervenors have challenged the contention that the unfiled discovery documents belong under seal, the district court must require State Farm to make an actual showing of good cause for their continuing protection under Federal Rule of Civil Procedure 26(c).”); *Phillips*, 307 F.3d at 1212 (remanding a challenge to a protective order by an intervening party to the lower court to conduct a “good cause” analysis).

Good cause undoubtedly justified the sealing of great portions of the record in this case, which is replete with competitively sensitive information. SER 441 (Rice Decl.); SER 409 (Kaplan, Inc.’s Opposition To Motion To Unseal); SER 415 (Taylor Unsealing Decl.); *see also* Fed. R. Civ. P. 26(c)(7); *Phillips*, 307 F.3d at 1211; *Kamakana*, 331 F.3d at 1179. Having declined Appellees’ offer to review confidential documents, Gaudet is in no position to mount a broad attack on confidentiality. *See Phillips*, 307 F.3d at 1213 (“when a party attaches a sealed

discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.”).

Moreover, as explained in detail above, any concerns over Gaudet's right to access the record were addressed adequately; subject only to his signing of the protective order to ensure the confidentiality of sensitive information contained in the documents, Gaudet was offered access to significant portions of the sealed record—including the only potentially dispositive papers filed in this action, *i.e.*, the summary judgment filings.<sup>3</sup> SER 418 (Taylor Unsealing Decl. Exh. A). This offer, which was inexplicably rejected by Gaudet, is in keeping with the mechanism embraced by the *Foltz* court for resolving disputes over the maintenance of a sealed record. *See Foltz*, 331 F.3d at 1133–34 (“[A]ny legitimate interest . . . in continued secrecy [of confidential documents] as against the public at large can be accommodated by placing [the collateral litigants] under the same restrictions on use and disclosure contained in the original protective order.”) (internal citation and quotation marks omitted). Gaudet, himself having been offered access to the sealed record in accordance with the Ninth Circuit's

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<sup>3</sup> Also as explained above, other Class members took the opportunity to review the summary judgment pleadings filed under seal in this case, and did not make any additional objections based on their review of these confidential papers.

directives, is in no position to attempt to vindicate the general public's access rights. Any concerns about whether Gaudet had access to all information necessary to his determination of whether to object to the settlement were addressed by the parties and to the District Court's satisfaction.

For each of the foregoing reasons, the District Court was not required to abrogate the protective order before considering the fairness of the class action settlement here.

**V. The *Cy Pres* Provision of the Settlement Was Appropriate and Is Now a Moot Point**

A. The *Cy Pres* Provision Was Appropriate

Juranek argues that the District Court erred by applying the wrong legal standard in approving the *cy pres* provision of the Settlement. JuraneK at 26–28. Siegel similarly argues that the *cy pres* provision is “unwarranted because the class is identifiable and could stand to receive much more ‘relief’ [*i.e.*, money] than is currently offered through the claims process.” Siegel at 19–20.

However, the *cy pres* provision in the Settlement was appropriate for at least two reasons. First, the complaint in this action alleged a host of violations of the antitrust laws, resulting in an alleged overcharge to BAR/BRI's customers. Plaintiffs sought recovery of that overcharge. Plaintiffs did not seek a full refund of the purchase price of their respective BAR/BRI courses. Indeed, as the District Court pointed out, the 30% cap “coincides with Plaintiffs' expert's estimate that

the average overcharge resulting from Defendants' alleged conduct was approximately 30% nationwide." ER 50 (Opinion at 18); ER 97 (Findings ¶ 84).

Second, as also noted by the District Court, "[b]ecause the Net Settlement Fund is to be distributed *pro rata* among the Class Members who make a valid claim, the [30% cap on individual recovery] prevents a small group from receiving a multi-million dollar windfall." ER 49–50 (Opinion at 17–18).

Juranek argues that the Second Circuit's decision in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), holds that a district court should look to treble damages when deciding the fairness of a *cy pres* provision. The Second Circuit noted in *Wilhelmina* that "a treble damages award did lie within the ambit of the District Court's discretion and should be considered on remand." *Id.* at 435–36. But on remand, the district court "decline[d] to award a *pro rata* distribution of the residual settlement funds to already-compensated class members in excess of single damages." *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB), 2007 WL 1944343, at \*9 (S.D.N.Y. July 5, 2007). Moreover, the district court noted that *cy pres* is not only appropriate where class members are difficult to identify or locate, or where the amount to be distributed to each individual class member is so small as to render the distribution impracticable, but also in cases where there are simply unclaimed funds left over after all class members have had a full opportunity to make claims. *Id.* at \*10.

Finally, the district court ultimately decided to reinstate the *cy pres* award made in its earlier opinion. *Id.*

B. The Appropriateness of the *Cy Pres* Provision Is Moot Because the Claims Actually Made on the Settlement Fund Leave No Funds for *Cy Pres* Distribution

Even if this Court believes the *cy pres* provision in this Settlement to have been inappropriate, the point has been rendered moot because as of September 28, 2007, the number of claimants exceeded the number needed to exhaust the net Settlement fund. *See* SER 221–22 (Sept. Sartory Decl. ¶ 13) (“there will be no funds remaining in the Net Settlement Fund after making the Maximum Payment to Authorized Claimants . . .”). Accordingly, when the funds are ultimately distributed to claimants, there will be no funds left over for *cy pres* distribution. *Id.*

## CONCLUSION

For each and all of the foregoing reasons, the District Court's approval of the Settlement should be affirmed.

Dated: May 27, 2008

Respectfully submitted,

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## **STATEMENT OF RELATED CASES**

Defendants-Appellees West Publishing Corporation and Kaplan, Inc. are aware of no related cases pending in this Court other than those that have already been consolidated: 07-56643, 07-56645, 07-56646, 07-56647, 07-56649, 07-56650, 07-56651, and 07-56833.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and, according to my word processing software (Microsoft Word), contains 12,858 words.

Dated: May 27, 2008

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James P. Tallon

## **CERTIFICATE OF SERVICE**

I hereby certify service of a true and correct copy of the foregoing Defendants-Appellees' Response Brief by FedEx overnight delivery, on May 27, 2008, on all counsel as indicated on the attached service list. In addition, I certify that the original and the required number of copies are being filed with the Clerk of the Court on the same day.

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United States Court of Appeals for the Ninth Circuit

Consolidated Case Nos. 07-56643, 07-56645, 07-56646, 07-56647, 07-56649, 07-56650, 07-56651, and 07-56833

*Rodriguez, et al. v. West Publishing Corp., et al.*

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