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

10 RYAN RODRIGUEZ, REENA B.
11 FRAILICH, LOREDANA NESCI,
12 JENNIFER BRAZEAL and LISA
13 GINTZ, on behalf of themselves and all
others similarly situated,

14 Plaintiffs,

15 vs.

16 WEST PUBLISHING
CORPORATION, a Minnesota
17 Corporation dba BAR/BRI, and
18 KAPLAN, INC., a Delaware
corporation,

19 Defendants.

CASE NO. CV 05-3222 R(MC_x)

**MCGUIREWOODS LLP'S REPLY
ON MOTION FOR
RECONSIDERATION**

Hearing Date: August 9, 2010
Time: 10:00 a.m.
Place: Courtroom 8

20
21 **AND CONSOLIDATED ACTION**

1 **I. INTRODUCTION**

2 McGuireWoods LLP ("McGuireWoods") respectfully submits the following
3 reply to the oppositions filed by Robert Gaudet, Jr. and Sandeep Gopalan (the
4 "Gaudet Objectors") and George Schneider, Jonathan Slomba, James
5 Puntumapanitch, Justin Head and Ryan Helfrich (the "Schneider Objectors") to
6 McGuireWoods' Motion for Reconsideration. Fraught with personal attacks,
7 sarcasm, and inaccuracies, the oppositions of the Gaudet Objectors and the
8 Schneider Objectors should be rejected and McGuireWoods' Motion for
9 Reconsideration granted.

10 As set forth in its motion for reconsideration, McGuireWoods is simply
11 requesting this Court review California law, as mandated by the Ninth Circuit, and
12 not assume *Image Tech. Serv. v. Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998)
13 correctly characterizes the law of California. In doing so, the Court should note that
14 *Image Tech.* was not decided by a California court, was described four times by its
15 own Ninth Circuit authors as "exceptional," and articulates a California automatic
16 attorneys fees forfeiture rule that does not exist in California, is contrary to the
17 equitable principles underlying the award of attorneys fees in California, and is
18 contrary to several subsequent California cases.

19 **II. MCGUIREWOODS' MOTION FOR RECONSIDERATION IS**
20 **PROPER AND SHOULD BE GRANTED**

21 **A. The Schneider Objectors' Self-Serving Attempts to Rewrite the**
22 **Facts and the Law Must Fail**

23 The Schneider Objectors distort the law, the facts, the decision of this Court,
24 and the opinion of the Ninth Circuit, in a transparent effort to claim credit (and fees
25 for themselves) for the denial of McGuireWoods' fees despite the extraordinarily
26 successful efforts of McGuireWoods – not the Schneider Objectors – on behalf of
27 the Class.

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1 For example, in effort to undermine McGuireWoods' position and bolster
2 their own, the Schneider Objectors ask the Court to alter the universally accepted
3 basis for awarding attorneys' fees in a common fund case: equity. *See Boeing Co.*
4 *v. Van Gemert*, 444 U.S. 472, 478 (1980). This is necessary because the Schneider
5 Objectors cannot quibble with the proposition that it would be inequitable to deny
6 McGuireWoods fees in this case. If the Ninth Circuit did not agree, it simply would
7 have made a final determination of the award of attorneys' fees to McGuireWoods
8 with no need for a remand to this Court.

9 In support of their effort to protect their own fee award and deny fees to
10 McGuireWoods, the Schneider Objectors rely on cases significantly older than the
11 applicable case law cited by McGuireWoods, as well as cases completely unrelated
12 to attorneys' fees. *See e.g.*, Schneider Brief at pp. 2-3, citing, *e.g. Goldstein v. Lees*,
13 46 Cal.App.3d 614, 622-23 (1975) (predating the applicable case law by at least 20
14 years); and *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.,*
15 *Inc.*, 36 Cal.4th 412, 423, 430 (2005), *Wright v. Issak*, 149 Cal.App.4th 1116, 1119
16 (2007), *Opp v. St. Paul Fire & Marine Ins. Co.*, 154 Cal.App.4th 71(2007),
17 *Hydrotech Systems Ltd. V. Oasis Waterpark*, 52 Cal.3d 988, 1000-02 (1991)
18 (interpreting statutory amendments that expressly REMOVED equitable
19 considerations with respect to obligations to pay unlicensed contractors; there are
20 NO similar statutes or statutory amendments removing equitable principles with
21 respect to the payment of attorneys in common fund cases).

22 These cases plainly do not govern here. By relying on such obtuse cases, the
23 Schneider Objectors effectively acknowledge that the applicable law is not in their
24 favor -- equitable principles, as well as recent California law, compel an award of
25 attorney fees to McGuireWoods in this case.

26 Indeed, subsequent California cases regarding conflicts of interest and
27 attorneys' fees confirm that in California equity allows compensation to attorneys
28 who provide substantial benefits to the client even if a conflict of interest in the

1 representation is found. These cases explicitly reject the notion that a conflict of
2 interest requires an automatic forfeiture of fees. *See, e.g., Mardirossian & Assoc.*,
3 153 Cal. App. 4th at 279, 62 Cal. Rptr. 3d at 683 (denying forfeiture of fees because
4 challenger "has not shown the violation was particularly egregious or that he was in
5 any way prejudiced by it"); *Sullivan v. Dorsa*, 128 Cal. App. 4th 947, 965 27 Cal.
6 Rptr. 3d 547, 561 (awarding fees because challenger "fail[ed] to show that any
7 violation of the rules governing representation of adverse interests was *serious*
8 enough to *compel* a forfeiture of fees") (emphasis in original); *Pringle v. La*
9 *Chapelle*, 73 Cal. App. 4th 1000, 1006, 87 Cal. Rptr. 2d 90, 94 (1999) (California
10 law requires that there be a "serious violation of the attorney's responsibilities before
11 an attorney who violates an ethical rule is required to forfeit fees").

12 As these recent cases illustrate, *Image Tech's* description of an automatic
13 forfeiture rule in California is contrary to California law – as set forth in foregoing
14 subsequent California opinions – and is therefore not binding on this court. *See*
15 *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th Cir. 2008) (the Ninth Circuit's
16 interpretations of state law are "only binding in the absence of any subsequent
17 indication from the California courts that our interpretation was incorrect.")

18 Further, the Schneider Objectors' failure to specifically discuss the precise
19 words of the foregoing subsequent California cases (rejecting an automatic
20 forfeiture rule) reinforces the absence of a rational basis for arguing that there is an
21 automatic forfeiture rule in California.

22 The Schneider Objectors go further than simply ignoring the applicable law.
23 Their description of the incentive agreements, for example, including the state of the
24 law at the time the incentive agreements were executed and the determinations made
25 by this Court and the Ninth Circuit regarding those agreements, is factually incorrect
26 and unsupported in their opposition brief. The Schneider Objectors flatly ignore key
27 facts highlighted by the Ninth Circuit in its remand to this Court to consider "in the
28 first instance" the effect, "if any," of the incentive agreements on McGuireWoods'

1 entitlement to fees. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967-68 (9th
2 Cir. 2009). As the Ninth Circuit recognized, the incentive agreements not only
3 required court approval before any incentive could be awarded, but also made clear
4 that the terms of the incentive agreements had no impact on the decision to settle
5 this case for \$49 million -- nearly 4 times the incentive maximizing ceiling provided
6 for in the agreements. *Id.* at 968. Moreover, when this Court awarded fees to
7 McGuireWoods, it did so only after reviewing all of the potential ethical and class
8 action issues and, like the Ninth Circuit, found McGuireWoods' conduct ultimately
9 caused no harm to the Class.

10 Finally, the logical inconsistency of the Schneider Objectors' opposition is
11 exposed by their position that even work performed by McGuireWoods *after* the
12 incentive awards were denied is not compensable. Once this Court approved the
13 Settlement and denied the incentive awards in July 2007, any "conflict" between the
14 Class representatives and the Class evaporated, and there is no basis for denying
15 McGuireWoods fees for the continued work it did on behalf of the Class at the
16 behest of this Court.

17 In short, the Schneider Objectors' opposition should be seen for what it is -- a
18 distorted, hollow claim for fees that cannot even present a plausible alternative
19 interpretation to the words of the recent California cases explicitly rejecting an
20 automatic attorneys' fees forfeiture rule.

21 The Schneider Objectors' stolid arguments and inability to deny the
22 California case law rejecting an automatic forfeiture rule compels a granting of
23 McGuireWoods' motion for reconsideration.

24 **B. The Gaudet Objectors Misstate the Record**

25 L.R. 7-18 permits reconsideration upon "a manifest showing of a failure to
26 consider material facts presented to the Court before such decision." *Id.* at (c). This
27 is exactly the situation here, and the Gaudet Objectors' unsupported claim that the
28 McGuireWoods' Motion should be denied because it does not comply with this rule

1 as it "fails to identify any material facts which were disregarded by the Court" in
2 entering its order of February 5, 2010 is difficult to fathom.. In fact,
3 McGuireWoods' Motion identifies numerous facts which were (1) material to the
4 analysis which this Court was instructed to perform pursuant to the opinion issued
5 by the Ninth Circuit, and (2) not considered by this Court in rendering its February
6 5, 2010 Order, including:

7 *First*, the vigorous prosecution of this case undeniably was led by
8 McGuireWoods and the equities significantly weigh in favor of an award of
9 attorneys' fees to McGuireWoods for those efforts;

10 *Second*, the Class has benefitted substantially from the efforts of
11 McGuireWoods, as the Ninth Circuit acknowledged, and the record is free from any
12 implication of "taint" on any of McGuireWoods' work for the Class;

13 *Third*, contrary to this Court's Order of February 5, 2010, rather than an
14 instruction to deny fees to McGuireWoods the Ninth Circuit expressly declined to
15 offer an opinion on what effect, if any, the incentive agreements should have on the
16 fee award to Class Counsel, deferring that decision "in the first instance" for
17 determination by this Court on an adequate factual record. *Rodriguez v. West*
18 *Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009);

19 *Fourth*, there clearly was no egregious conduct by McGuireWoods. The
20 incentive agreements were entered into before McGuireWoods even became
21 involved in the case, the state of the law at the time the agreements were executed
22 and at the time they were considered by this Court and the Ninth Circuit did not
23 prohibit such agreements and the agreements clearly were not concealed during the
24 course of the litigation. Rather, the agreements were produced to defendants during
25 discovery, and the Class Representatives were extensively questioned about them
26 during depositions. Even though certification of the Class was vigorously contested,
27 the incentive agreements were considered to be so inconsequential that defendants
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1 never made them a part of this challenge, a primary reason why the incentive
2 agreements were not addressed during the class certification proceedings;

3 *Fifth*, there was no harm to the Class. The Ninth Circuit not only expressly
4 found that the presence of the conflicted Class Representatives was **harmless** and
5 that Class Counsel was adequate, *Rodriguez*, 563 F.3d at 961, but also that the
6 Settlement was at arms length and fair "[b]y any measure." *Id.* at 968. This Court
7 likewise specifically found Class Counsel's representation to be adequate. *See*
8 *Opinion and Order* dated September 10, 2007 at 20. Without any harm, there
9 simply is no basis for a forfeiture of fees under California law or as a matter of
10 equity; and

11 *Sixth*, even if the factual record did not support an award of fees for the
12 litigation as a whole, McGuireWoods plainly is entitled to fees for services rendered
13 to the Class from July 2007, when the incentive agreements were nullified by this
14 Court, to present. After the Court fully considered the nature of any conflict created
15 by the agreements and denied incentive awards to any class representatives, the
16 representation of McGuireWoods could not have been "conflicted." If this Court or
17 the Ninth Circuit thought otherwise, there was ample opportunity to have removed
18 McGuireWoods as Class Counsel, something both Courts declined to do. No
19 principle of equity or fairness possibly could support denial of compensation for
20 work done by McGuireWoods after the conflict was removed.

21 All of these facts weigh heavily in favor of granting McGuireWoods' Motion
22 and reinstating this Court's prior award of attorneys' fees to McGuireWoods for
23 legal services rendered on behalf of the Class.

24 **III. CONCLUSION**

25 For the reasons stated herein, this Court should reconsider the Final
26 Determination Order and reinstate McGuireWoods LLP's, full lodestar through
27 August 31, 2009 and award a multiplier of 1.75 up to 25% of the Settlement Fund.

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DATE: July 6, 2010

Respectfully submitted,

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