

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Appeals Nos. 09-56278, 09-56314, 09-56500,  
10-55309, 10-55342, and 10-55372

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**RYAN RODRIGUEZ, et al.,**  
*Plaintiffs-Appellees*

and

**WEST PUBLISHING CORPORATION, A MINNESOTA  
CORPORATION d.b.a. BAR/BRI, et al**  
*Defendants-Appellees*

vs.

**JUSTIN HEAD, et al.,**  
*Objectors-Appellants*

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

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**MOTION TO CONSOLIDATE AND EXPEDITE APPEALS  
(CIRCUIT RULE 27-12)**

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Ryan Rodriguez et al.*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Appellants McGuireWoods LLP ("McGuireWoods") (10-55342), Finkelstein Thompson LLP ("Finkelstein Thompson") (10-55372) and Zwerling, Schachter & Zwerling, LLP ("Zwerling Schachter") (10-55372) (collectively "Class Counsel" or "Movants"), request an order: (1) consolidating the six pending appeals filed from two orders issued by the District Court on remand in *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009) (collectively "All Pending Appeals")<sup>1</sup>; (2) expediting the briefing schedule on the appeals filed by Class Counsel (Nos. 10-55342 and 10-55372) and Sandra Disner, Executor of the Estate of Eliot G. Disner, as successor-in-interest to Eliot G. Disner and Disner Law Corporation, Class Counsel ("Disner") (No. 10-55309), and combining it with the briefing schedule on Appeal Nos. 09-56278, 09-56314 and 09-56500; and (3) expediting the hearing on All Pending Appeals.

Good cause exists to consolidate All Pending Appeals because the issues presented are identical and/or necessarily intertwined, and

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<sup>1</sup> Nos. 09-56278, 09-56314, 09-56500, 10-55309, 10-55342, and 10-55372.

consolidation will promote judicial economy and efficiency, as it will permit joint briefing and one hearing.

Good cause also exists to expedite the briefing schedule on the appeals filed by Class Counsel and Disner, as well as the hearing on All Pending Appeals, because distribution of the Net Settlement Fund<sup>2</sup> to nearly 90,000 Authorized Claimants can only take place after All Pending Appeals are resolved. Authorized Claimants have already waited long enough -- the Settlement in this case was approved by the District Court over 2 years ago and was affirmed by this Court as fair, adequate and reasonable "by any measure" approximately a year ago. *Id.* at 955. Further delay in briefing, hearing and resolving All Pending Appeals will (1) cause many Authorized Claimants to be deprived recovery, and (2) increase the administration costs of the Settlement, thereby reducing the amount of money available for distribution to the Authorized Claimants.

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<sup>2</sup> Unless otherwise stated, all capitalized terms have the same meaning as set forth in the Stipulation and Settlement Agreement, dated February 2, 2007 ("Settlement Agreement"). Supplemental Excerpts of Record of Settling Plaintiffs in *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009) at 2043-2106.

## II. PROCEDURAL STATUS AND PROPOSED SCHEDULE

Transcripts have been ordered and the opening briefs on the three previously consolidated appeals (Nos. 09-56278, 09-56314, 09-56500) ("Objectors' Appeals") have been filed. Answering briefs in Objectors' Appeals are currently due on April 28, 2010. No hearing date has been set on Objectors' Appeals.

The Court recently set a briefing schedule on the appeals filed by Class Counsel and Disner to commence in August 2010.

Transcripts have been ordered. No hearing date has been set on the appeals filed by Class Counsel and Disner.

Movants propose that the briefing schedules on All Pending Appeals be combined and set as follows:

**Monday, May 10, 2010** - Opening Briefs on Appeal Nos. 10-55309, 10-55342, and 10-55372 and Answering Briefs on Appeal Nos. 09-56278, 09-56314, 0956500 due;

**Wednesday June 9, 2010** - Answering Briefs on Appeal Nos. 10-55309, 10-55342, and 10-55372 and Reply Briefs on Appeal Nos. 09-56278, 09-56314, 0956500 due; and

**Wednesday, June 23, 2010**- Reply Briefs on Appeal Nos. 10-55309, 10-55342, and 10-55372 due.

Movants request that one hearing for All Pending Appeals be set for as soon thereafter as possible.

On Wednesday, March 24, 2010, Class Counsel informed all parties to All Pending Appeals of its intention to file this motion and requested that each set forth its position with regard to the motion. The following is the position of each of the parties who responded:

Appellants in the following docket numbers support this motion: 09-56278, 09-56314, 10-55309.

Defendant Kaplan, Inc. does not believe that it is a party to All Pending Appeals and takes no position on this motion.

Appellant in 09-56500 opposes this motion without explanation.

Of the appellees, other than the parties listed above, no other potential appellee has stated any opposition to this motion.

### **III. BACKGROUND**

All Pending Appeals relate to fees requested by Class Counsel and various Objectors for the benefit each claims to have conferred on the certified Class in the settlement of an antitrust class action filed approximately five years ago (the "Action"). The Settlement includes

\$49 million plus injunctive relief, and was reached on the eve of trial over three years ago.

In September 2007, over the objections of various Class Members, the District Court (Real, J.): (1) approved the Settlement as fair, adequate and reasonable; (2) awarded Class Counsel attorneys' fees in the amount of their lodestar with a multiplier of 1.75 (limited to 25% of the Settlement Fund); and (3) denied incentive awards to all named Class Representatives. In October 2007, the District Court entered an order denying fees to counsel for Objectors. A number of unnamed Class Members appealed (1) the order approving the Settlement, (2) the order awarding attorneys' fees to Class Counsel; and (3) the order denying fees to Objectors' counsel.

In April 2009, this Court affirmed the District Court's order approving the Settlement, finding "[b]y any measure, this settlement is fair, adequate, and reasonable." *Rodriguez, supra*, 563 F.3d at 968. At the same time, this Court reversed and remanded the District Court's orders granting Class Counsel attorneys' fees and denying fees to Objectors' counsel, instructing the District Court to (1) consider "the effect, if any, of the incentive agreements on entitlement to fees" awarded to Class Counsel, and (2) determine a "reasonable" fee for

Objectors' counsel "given their contribution to the denial of the requests for incentive awards." *Id.* at 969.

On remand, after two hearings, the District Court issued a final order in August 2009 (the "August 2009 Order") with respect to fees to the Objectors as follows: (1) granting \$8,125 in attorneys' fees to Objectors George Schneider, Jonathan Slomba, James Puntumapanitch, Justin Head and Ryan Helfrich (the "Schneider/Head Objectors"); (2) granting \$8,125 in attorneys' fees to Objectors David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang, Sarah McDonald, Cara Patton, Rachel Schwartz, and Greg Thomas (the "Feldman Objectors"), and (3) denying fees as to all other Objectors. Three sets of Objectors appealed the August 2009 Order: the Schneider/Head Objectors (09-56278); Sarah Siegel, Evans & Mullinix, P.A., Jennifer Brown, McElroy, Daniel M. Schafer, David Oriol and Jason Tingle (the "Siegel Objectors") (09-56314); and Robert J. Gaudet, Jr. ("Gaudet") (09-56500). Objectors' Appeals were consolidated on January 5, 2010 over an opposed motion filed by Movants.

Also on remand, after two additional hearings, the District Court entered a final Order Granting Settling Class Plaintiffs' Motion

for Distribution of Net Settlement Fund Upon the Occurrence of the Effective Date and for Approval and Distribution of Attorneys' Fees and Expenses on February 3, 2010 (the "February 2010 Order").

Among other things, the February 2010 Order: (1) denied any fees to Class Counsel McGuireWoods; (2) significantly reduced the attorneys' fees awarded to Class Counsel Finkelstein Thompson and Zwerling Schachter; and (3) awarded all Class Counsel their costs and expenses incurred in prosecuting the Action. Appeals of the February 2010 Order were filed by McGuireWoods, Finkelstein Thompson and Zwerling Schachter<sup>3</sup>, and Disner.<sup>4</sup>

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<sup>3</sup> On February 5, 2010, McGuireWoods filed a Motion for Reconsideration of the February 2010 Order. Finkelstein Thompson and Zwerling Schachter also filed a Motion for Reconsideration on February 12, 2010. Class Counsel's Motions for Reconsideration were scheduled for hearing on March 29, 2010. Fee motions filed by various Objectors were also scheduled to be heard by the District Court on March 29, 2010. The District Court took all pending motions off calendar, however, when it learned that Class Counsel had filed Notices of Appeal of the February 2010 Order, as it believed that it had been "divested of jurisdiction." *See* Docket No. 666. Class Counsel's *ex parte* application to return the hearings on both Class Counsel's Motions for Reconsideration and Objectors' fee motions to the District Court's calendar was denied by the District Court on March 3, 2010.

<sup>4</sup> Other than the Disner's uncertain standing, it appears that the Disner Appeal raises no issues distinct from those of the appeal filed by McGuireWoods.

The February 2010 Order approved the administrative determination of the Claims Administrator ("Rust") rejecting and accepting Claims and determining the amount of those Claims. The February 2010 Order provides for distribution of the Net Settlement Fund upon the occurrence of the Effective Date. Distribution of the Net Settlement Fund could be made to Authorized Claimants immediately upon resolution of All Pending Appeals. *See* Declaration of Eric J. Miller, dated October 8, 2009, District Court Docket, Document Number 584 (the "Miller Decl.") at ¶ 31.

**IV. GOOD CAUSE EXISTS TO CONSOLIDATE ALL PENDING APPEALS**

**A. The Issues Raised in All Pending Appeals are Identical and the Outcomes Necessarily Intertwined**

The issues presented on All Pending Appeals are virtually identical: whether the District Court abused its discretion in issuing its orders concerning fees to Class Counsel and Objectors' counsel for benefit, if any, conferred by them upon the Class. As a result, the outcome of each of All Pending Appeals will either impact or be impacted by the outcome of the other appeals.

The ultimate result in the appeals filed by Class Counsel and Disner will necessarily impact the outcome of Objectors' Appeals and any further appeals filed. Specifically, the attorneys' fees ultimately awarded to Class Counsel will at least partially dictate both the amount of benefit, if any, the Objectors will have conferred on the Class, and the amount of any fees they are awarded for such benefit. If All Pending Appeals are consolidated, the contributions, entitlement and amount of fees of all appellants will be in front of the Court at one time, providing the optimal forum for making the determinations to allow this Action to be concluded as quickly as possible. Without consolidation, determinations will be made piecemeal, and appeals will continue *ad nauseam*.

The opening briefs recently filed by the Schneider/Head Objectors (09-56278) and by the Siegel Objectors (09-56314) demonstrate the direct overlap of issues amongst All Pending Appeals. The Schneider Head Objectors and the Siegel Objectors appealed the August 2009 Order, which awarded attorneys' fees to certain Objectors for their contribution to the District Court's decision to deny incentive awards to all Class Representatives in 2007, thereby increasing the size of the Net Settlement Fund by \$325,000. The

District Court found that only two sets of Objectors, the Schneider/Head Objectors and the Feldman Objectors contributed to its decision and awarded a total of approximately \$16,250 in attorneys' fees to those Objectors for their contribution. The Schneider/Head Objectors were awarded \$8,125. The District Court found no such contribution by the Siegel Objectors, and denied their request for attorneys' fees in the August 2009 Order. Subsequently, the District Court entered the February 2010 Order, which resulted (subject to an appeal) in an additional increase in the Net Settlement Fund of approximately \$10 million.

In their opening brief on their appeal, the Schneider/Head Objectors dedicate almost two pages two discussing the proceedings taking place after their appeal of the August 2009 Order was filed, demonstrating how intertwined the August 2009 and February 2010 orders are. *See* Schneider/Head Opening Brief at 17-19. The Schneider/Head Objectors explicitly recognize that "the procedural posture of this case includes the three instant appeals by objectors on their first fee applications, as well as the recently-filed appeals by Class Counsel relating to their own fees." *Id.* at 19.

Likewise, in their opening brief on their appeal of the August 2009 Order, the Siegel Objectors are claiming credit for both increases in the Net Settlement Fund and seek credit and fees for both in their appeal of the August 2009 Order: “Sixteen Thousand Dollars (\$16,000) bears no readily ascertainable relationship to the almost Ten Million Dollar (\$10,000,000) benefit which was realized due to the combined efforts of objectors' counsel.” Siegel Brief at 12. Leaving aside the absurdity of their request for a fee award on an event that happened almost six months after they filed their appeal, the Siegel Objectors' argument establishes how intertwined the key issues of Objectors' Appeals are with the issues presented in the appeals filed by Class Counsel and Disner.

Therefore, good cause exists to consolidate All Pending Appeals.

**B. The Parties Involved in All Pending Appeals are Identical**

The August 2009 Order and the February 2010 Order were entered on remand of a consolidated appeal involving these same issues and these same parties. The 2008 consolidation of the first round of appeals in the Action effectively streamlined the briefing and

hearing. Similarly, the presence of identical issues and parties here weighs in favor of consolidation of All Pending Appeals.

**C. Consolidation Will Promote Judicial Economy and Benefit the Class**

Consolidation will permit joint briefing and one hearing on All Pending Appeals, and will cause no delay. With the Settlement already affirmed on appeal approximately a year ago, there is a significant benefit to the Court and the Class if these appeals are consolidated, as it will decrease the number of briefs and hearings on similar issues. The end result of the consolidation will be a combined briefing schedule that will be very similar to that already in place and underway on the Objectors' Appeals.

For the foregoing reasons, Movants respectfully request that this Court consolidate All Pending Appeals in this matter with the first-filed case to be the lead appellate case (09-56278, Schneider/Head, *et al.*).

**V. GOOD CAUSE EXISTS TO EXPEDITE THE APPEALS**

Under Circuit Rule 27-12, a motion to expedite may be granted for good cause. Good cause to expedite All Pending Appeals exists here as there has already been an excessive delay in distributing the

Net Settlement Fund to nearly 90,000 Authorized Claimants.

Moreover, as discussed below, delays in distribution result in the complete loss of recovery for a large number of those Authorized Claimants – a number that continues to increase as each day passes.

The Settlement was finalized in February 2007, approved in September 2007 and affirmed in April 2009. To date, Class Members have not received any recovery. Nor can they, as no distributions can be made until All Pending Appeals are resolved. Once the appeals have been resolved, however, distribution of the Net Settlement Fund could be made to Authorized Claimants almost *immediately*. See Miller Decl., at ¶ 31. Until that time, both Authorized Claimant attrition and costs of administration of the Settlement will continue to rise, depleting the Net Settlement Fund and decreasing recovery to the Class. As of October 8, 2009, the Net Settlement Fund was valued at approximately \$48,567,327.32, which includes interest of \$2,900,067.92, less taxes of \$144,200, and the unpaid costs of claims administration. See Miller Decl. at ¶ 26. Expediting the appeals will reduce attrition and costs.

Once Class Members receive notice and file claims, it is important to keep them "connected" to the claims administration

process to insure they can receive payment on their Claims. Here, as explained in the Miller Decl., connection is lost with Authorized Claimants over time as they fail to provide updated information after moving (changing addresses and phone numbers) or changing names, through marriage or otherwise. *See* Miller Decl. at ¶ 20-21.

This process of attrition grows worse the larger the class and the longer appeals take to resolve, which in this Action has already been over two years. During the deficiency phase of this administration, the Claims Administrator sent 23,017 deficiency letters to claimants approximately 18 months after the Claim Deadline. Of those letters, 1,243 were returned as undeliverable with a return address and 1,562 were returned as "undeliverable without a forwarding address." *See* Miller Decl. at ¶ 21. There is reason to suspect that Authorized Claimants who were not sent a deficiency letter (who total three times as many as those who were sent a deficiency letter) move and fail to update their address with similar frequency.<sup>5</sup> Based upon these statistics, 12,000 Authorized Claimants will be lost every 18 months until distribution is made, resulting in a

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<sup>5</sup> *See* Declaration of Thomas R. Glenn, docket entry 54-2 in case no. 07-56643 in *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009) at ¶ 9.

substantial number of Authorized Claimants who will not receive a distribution check. The longer the appeals process continues, the larger that number will grow. In fact, if the hearing on the appeals is scheduled in the normal course, it is likely that the number could exceed 24,000, or almost one quarter of the Authorized Claimants. Movants seek to avoid such inevitability, or at least keep it to a minimum by expediting the briefing schedule on the Appeals filed by Class Counsel and Disner and expediting the hearing on All Pending Appeals.

## **VI. CONCLUSION**

For the foregoing reasons, Movants respectfully request that the court consolidate All Pending Appeals in this matter, Appeal Nos. 09-56278, 09-56314, 09-56500, 10-55309, 10-55342, and 10-55372.

Movants also respectfully request that this Court replace the current briefing schedule with the following:

**Monday, May 10, 2010** - Class Counsel and Disner to file Opening Briefs on Appeal Nos. 10-55309, 10-55342, and 10-55372 and Answering Briefs on Appeal Nos. 09-56278, 09-56314, 09-56500 due;



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