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

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

Plaintiffs,

vs.

WEST PUBLISHING CORPORATION,
Minnesota Corporation dba BAR/BRI
and KAPLAN, Inc., a Delaware
Corporation.
Defendants.

AND CONSOLIDATED ACTION

Case No. CV 05-3222 R(MC_x)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
FINKELSTEIN THOMPSON LLP'S
AND ZWERLING, SCHACHTER &
ZWERLING, LLP'S MOTION FOR
RECONSIDERATION OF
ORDER ON ATTORNEYS' FEES**

Date: March 15, 2010
Time: 10:00 a.m.
Place: Courtroom 8

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1 **I. INTRODUCTION**

2 On September 10, 2007, this Court awarded Class Counsel (including
3 Finkelstein Thompson LLP (“Finkelstein”) and Zwerling, Schachter & Zwerling,
4 LLP (“Zwerling”)) an award of attorneys’ fees in the amount of their lodestar as of
5 the Effective Date (as defined in the Stipulation and Settlement Agreement [the
6 “Stipulation”]), with a 1.75 multiplier¹ (“Original Fee Order”). While the Original
7 Fee Order and the Final Order and Judgment Approving Settlement (the
8 “Settlement”) were appealed to the Ninth Circuit, the Ninth Circuit *never* criticized
9 the performance of Finkelstein or Zwerling. Indeed, the Ninth Circuit explicitly
10 noted the *benefit* both firms brought to the above-captioned action (the “Action”)
11 by ensuring that the Class was adequately represented despite the existence of
12 certain incentive fee agreements (“Incentive Award Agreements”) in which neither
13 Finkelstein and Zwerling, nor their clients, were implicated. *Rodriguez v. West*
14 *Publishing Corp.*, 563 F.3d 948, 961 (9th Cir. 2009) (“[T]he participation of
15 [Finkelstein and Zwerling] two firms that did not enter incentive agreements . . .
16 assuages any additional concerns that a conflict created by the incentive
17 agreements may have adversely affected the adequacy of representation.”).

18 On remand, this Court reconsidered its Original Fee Order and reduced
19 Finkelstein’s and Zwerling’s fees by (1) eliminating the 1.75 multiplier, and (2)
20 cutting 10% of their respective lodestars (**a total reduction of approximately**
21 **37%**) to account for “excessive fees and non-compensable work, including work
22 done to preserve the award of attorneys’ fees, work done in connection with the
23 *Park* litigation, and other work performed that “conferred no benefit on the Class.”
24 *See* February 3, 2010 Order Granting Settling Class Plaintiffs’ Motion for
25

26
27 ¹ With a cap of 25% of the Gross Settlement Fund (as defined in the
28 Stipulation).

1 Distribution of Net Settlement Fund Upon the Occurrence of the Effective Date
2 and for Approval and Distribution of Attorneys' Fees and Expenses at 7 ("Final
3 Distribution Order")².

4 Finkelstein and Zwerling respectfully submit that the relevant portion of the
5 Final Distribution Order should be reconsidered since, but for the efforts of
6 Finkelstein and Zwerling, the Settlement very likely would not have survived
7 appellate review. Moreover, all of the time expended by Finkelstein and Zwerling
8 and included in their lodestars submitted to the Court benefitted the Class.
9 Accordingly, Finkelstein and Zwerling request that this Court reconsider the award
10 of attorneys' fees in the Final Distribution Order and grant Finkelstein and
11 Zwerling an attorneys' fees award totaling 1.43 of their lodestars (as adjusted
12 herein, *see* fn. 4, *infra*) as of August 31, 2009, or \$4,970,449.10.³ *See* Declaration
13 of Sidney K. Kanazawa (Docket No. 585) at ¶59.
14

15 **II. STANDARD OF REVIEW**

16 Local Rule 7-18 of the Central District provides that "[a] motion for
17 reconsideration of the decision on any motion may be made only on the grounds of
18 . . . a manifest showing of a failure to consider material facts presented to the Court
19 before such decision." L.R. 7-18. A reduction of attorneys' fees to Finkelstein and
20

21 ² Finkelstein and Zwerling only seek reconsideration of the portion of the
22 Final Distribution Order reducing the award of attorneys' fees to their respective
23 firms.

24 ³ In the Final Distribution Order, this Court denied attorneys' fee to
25 McGuireWoods LLP ("MW"). As a result, the 25% cap referred to in footnote 1
26 above would not be reached if the Court were to reinstate the Original Fee Award.
27 With the full 1.75 multiplier, Finkelstein and Zwerling would be entitled to a total
28 fee award of \$6,082,717.50. However, Finkelstein and Zwerling only seek
restoration of the fee award requested in the Final Distribution Motion (as if MW's
fees had also been awarded). Thus, Finkelstein seeks a fee award of \$2,536,737.82
and Zwerling seeks a fee award of \$2,433,711.28.

1 Zwerling is particularly inappropriate given the following material facts that were
2 before the Court before the issuance of the Final Distribution Order: (1) the
3 decision of the Ninth Circuit to uphold this Court's approval of the Settlement
4 despite the "impropriety" of the Incentive Award Agreements solely because of the
5 participation and efforts of the Finkelstein and Zwerling firms and their clients, (2)
6 the risks faced by Finkelstein and Zwerling in the litigation, and (3) the detailed
7 time records of Finkelstein and Zwerling which established the necessity and
8 zealotness of their advocacy and the benefits to the Class of their work.

9 **III. THE HISTORY OF THIS ACTION DEMONSTRATES THE**
10 **SIGNIFICANT CONTRIBUTIONS OF FINKELSTEIN AND**
11 **ZWERLING**

12 Reconsideration is particularly appropriate here, as the Final Distribution
13 Order fails to provide Finkelstein and Zwerling risk multipliers on their lodestars.
14 It is error to deny a risk multiplier when a case is fraught with risk and there is no
15 guarantee of payment as in this case. *In re Washington Public Power Supply*
16 *System Sec. Litig.*, 19 F.3d 1291, 1299-1302 (9th Cir. 1994) (abuse of discretion
17 for district court to deny a risk multiplier after acknowledging risk in pursuing
18 action on contingent basis); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th
19 Cir. 2002) (approving risk multiplier of 3.65 times current rates); *see also Matter*
20 *of Continental Illinois Securities Litigation*, 962 F.2d 566, 569 (7th Cir 1992)
21 (reversing lower court's denial of risk multiplier and "across-the-board" fee cut).

22 In this Action the Ninth Circuit recognized, as did this Court, that Class
23 Counsel "faced substantial risk in prosecuting this action; did not have the benefit
24 of fruits from underlying government actions; there were no controlling
25 precedents, especially with regard to the section 7 claims; defense counsel were
26 skilled and formidable; and there were a number of hurdles in proving both
27 damages and liability." *Rodriguez*, 563 F.3d at 967. The Ninth Circuit also
28

1 recognized, as did this Court, that the risk of decertification of this nationwide
2 Class remained high. *Id.* at 966.

3 Finkelstein and Zwerling played a critical role in bringing about and
4 protecting the \$49 million Settlement for the benefit of Class members. In doing
5 so, both firms collectively spent 6,752.98 hours litigating the Action and
6 preserving the settlement on appeal, resulting in a \$3,475,838.60 combined
7 lodestar.

8 Both firms have been centrally involved in the Action from virtually day
9 one. Their efforts have included, among other things: factual investigation;
10 drafting pleadings and motions; research; filing multiple briefs (for use both before
11 this Court and the Ninth Circuit); working with experts; assisting with discovery
12 issues (including both document discovery and depositions); participating in
13 settlement negotiations; drafting the Settlement documents; defending the
14 Settlement against objectors; and coordinating with the Claims Administrator in
15 responding to Class members inquiries. In all these endeavors, Finkelstein's and
16 Zwerling's years of experience in class action litigation contributed to the efficient
17 and effective prosecution of this Action.

18 Most significantly, the Ninth Circuit upheld this Court's approval of the
19 Settlement based precisely on Finkelstein's and Zwerling's participation and
20 advocacy in the Action. The Ninth Circuit found that "this impropriety [the
21 Incentive Award Agreements] did not require the district court to reject the
22 settlement negotiated in this case *because two non-conflicted class representatives*
23 *with non-conflicted counsel participated.*" *Rodriguez*, 563 F.3d at 967 (emphasis
24 supplied).

25 In short, both firms' efforts were crucial to the favorable result obtained. As
26 the court in *Washington Public Power Supply System* found, "[i]t is an established
27 practice in the private legal market to reward attorneys for taking the risk of non-
28

1 payment by paying them a premium over their normal hourly rates for winning
 2 contingency cases.” *Washington Public Power Supply System*, 19 F.3d at 1299.
 3 Thus, it was error to fail to apply the multiplier to the firms’ lodestar presented to
 4 the Court.

5 **IV. THIS COURT SHOULD NOT REDUCE FINKELSTEIN’S AND**
 6 **ZWERLING’S LODESTAR**

7 The Court in the Final Distribution Order reduced Finkelstein’s and
 8 Zwerling’s attorneys’ fee awards to account for “excessive fees and
 9 noncompensable work,” including (1) work done to preserve the award of
 10 attorneys’ fees, (2) work done in connection with the “*Park*” litigation, and (3)
 11 “other work performed,” which this Court found “conferred no benefits on the
 12 Class.” *Final Distribution Order* at 7. Given the record before the Court, it was
 13 error to reduce the firms’ attorneys’ fees awards as a result of any of these issues.

14 **A. Finkelstein’s and Zwerling’s Work Relating to the Conflict and**
 15 **Attorneys’ Fees Preserved the Settlement and Benefitted the Class**

16 As an initial matter, both Finkelstein and Zwerling carefully *eliminated* time
 17 spent preparing their attorneys’ fees applications from the lodestar submitted to
 18 this Court. Therefore neither firm seeks (or ever sought) compensation for time
 19 spent on that task. *See* Supplemental Declaration of Dan Drachler in Support of
 20 Zwerling Schachter & Zwerling LLP’s Application for Award of Attorneys’ Fees
 21 and Reimbursement of Expenses at ¶ 4, filed on October 26, 2009 (Docket No.
 22 598-3); Supplemental Declaration of Rosemary M. Rivas in Support of
 23 Finkelstein’s Application for Award of Attorneys’ Fees and Reimbursement of
 24 Expenses at ¶ 5, filed October 26, 2009 (Docket No. 598-4).
 25

26 However, Finkelstein and Zwerling did spend time (and continue to spend
 27 time) opposing the many frivolous applications for attorneys’ fees filed by certain
 28 objectors to the Settlement. These efforts were done in order to preserve the

1 proceeds of the Settlement for the Class from opportunistic objectors who have, at
2 every turn, sought to extract attorneys' fees from the Settlement for their dubious
3 "contributions" to this Action. Since Finkelstein's and Zwerling's lodestar
4 incurred in this task was incurred for the benefit of the Class, it is compensable. *In*
5 *re Nucorp Energy, Inc.* 764 F.2d 655, 661 (9th Cir. 1985) (fees awardable for
6 counsel for "creating, preserving, or protecting a fund or property for the benefit of
7 the class whom he represents.")

8 In this regard, the Court may have been led astray by the misleading
9 submissions of various objectors in opposition to Finkelstein's and Zwerling's
10 request for attorneys' fees. For example, Objector Robert Gaudet, Jr. identifies
11 several entries in the Zwerling time records which contain the words "attorneys'
12 fees" in them. *See* Opposition to Class Counsel's Time Sheets & Expenses at 9-
13 10, n. 3 (Docket No. 607) ("Gaudet November 18, 2009 Opposition"). Of the
14 seven entries identified, four dealt with opposing the attorneys' fees applications of
15 objectors' counsel which, if granted, would have significantly depleted the \$49
16 million Settlement. Successfully opposing those objectors' attorneys' fees
17 applications created a significant benefit for the Class. The remaining three entries
18 (which total 1.4 hours) refer to the logistics of submitting *all* of the final orders to
19 the Court regarding the final approval of the Settlement.⁴

21
22 ⁴ With respect to Finkelstein's time report, Gaudet cites to entries relating to
23 the "class conflict issue" and assumes that these time entries relate to Finkelstein's
24 fee award. Gaudet November 18, 2009 Opposition at 10, n. 4. The time spent on
25 this issue, however, related to the objectors' argument on appeal that as a result of
26 the "class conflict" the Settlement should be overturned. Based on Finkelstein's
27 research and argument on appeal, the Ninth Circuit upheld the settlement due to
28 the presence of non-conflicted counsel. *Rodriguez*, 563 F.3d at 961. Kendrick &
Nutley, counsel to certain objectors, identified a single 2.5 hour entry on April 9,
2007 (totaling \$1,125) in the time records of Finkelstein pertaining to fees. *See*
Supplemental Brief Re: Attorney's Fees (Docket No. 609) at Ex. 3 p. 2. This entry

1 **B. Work Done In Connection With The *Park* Litigation Benefitted**
2 **the Class**

3 This Court also reduced Finkelstein’s and Zwerling’s time to account for
4 “work done in connection with the *Park* litigation.” Final Distribution Order at 7
5 (citing *Park et al., v. The Thompson Corporation*, Case No. 05 Civ. 2931 (WHP)).⁵

6 First of all, no attorney at Finkelstein or Zwerling represented any party,
7 appeared or worked on the *Park* case. Again, the Court may have been misled in
8 this regard by the objectors herein. Objector Gaudet refers to work by the
9 Finkelstein and Zwerling firms “performed in a separate action.” Gaudet
10 November 18, 2009 Opposition at 11. However, neither firm performed, nor
11 indeed could perform, any work in the *Park* case.

12 The only time entries referring to *Park* reflect work which directly benefitted
13 the Class which Finkelstein and Zwerling represent in this Action. For example,
14 Zwerling incurred 6.3 hours in connection with insuring that a request by the *Park*
15 court for information gathered by the Claims Administrator in *this Action* did not
16 adversely impact this Action or the privacy rights of Class members in this Action.
17 Similarly, Zwerling incurred time to ensure that the Class here was not improperly
18 billed for the significant costs of administering the *Park* settlement. In short, these
19 efforts were incurred for the benefit of *this* Class, not the *Park* class. Moreover,
20 the total time devoted to these matters was 8.8 hours and therefore does not support
21 the Court’s 10% reduction (over 650 hours) in lodestar.
22

23
24 was included in error and has been excised from the lodestar and hours referred to
25 herein.

26 ⁵ *Park* was an unrelated class action brought against certain of the same
27 defendants on behalf of a partially overlapping class in the Southern District of
28 New York with different class representatives and different counsel. The Claims
Administrator in this case also served as the Claims Administrator in *Park*.

**ZWERLING, SCHACHTER &
ZWERLING, LLP**

By: /s/ Dan Drachler
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*Class Counsel and Counsel for Settling
Class Plaintiffs Kari Brewer and Lorraine
Rimson*

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13 I, Rosemary M. Rivas, am the ECF User whose identification and password are
14 being used to file Memorandum of Points and Authorities in Support of Finkelstein
15 Thompson LLP's and Zwerling, Schachter & Zwerling, LLP's Motion for
16 Reconsideration of Order on Attorneys' Fees. I hereby attest that Dan Drachler has
17 concurred in this filing.

18
19 Dated: February 12, 2010

FINKELSTEIN THOMPSON LLP

20
21 By: /s/ Rosemary M. Rivas
22 Rosemary M. Rivas
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CERTIFICATE OF SERVICE

I certify that on February 12, 2010, I have electronically filed the:

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF FINKELSTEIN THOMPSON LLP'S AND
ZWERLING, SCHACHTER & ZWERLING, LLP'S MOTION
FOR RECONSIDERATION OF ORDER ON ATTORNEYS'
FEES**

with the Clerk of the Court by using the CM/ECF system, which will automatically send an e-mail notification of such filing to the attorneys of record who are registered CM/ECF users.

Executed February 12, 2010, at San Francisco, California.

/s/ Rosemary M. Rivas
Rosemary M. Rivas