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5 *Class Counsel*

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

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

13 Plaintiffs,

14 vs.

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

18 Defendants.

CASE NO. CV 05-3222 R(MCx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF MCGUIREWOODS
LLP FOR RECONSIDERATION OF
ORDER DENYING ATTORNEYS'
FEES**

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

19
20 **AND CONSOLIDATED ACTION**

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1 **I. INTRODUCTION**

2 McGuireWoods LLP ("McGuireWoods") respectfully requests that this Court
3 reconsider its Order of February 5, 2010, denying any attorneys' fees for the
4 extensive, valuable work performed by McGuireWoods as Class Counsel (the
5 "Order").

6 It appears this Court construed the Ninth Circuit's mandate (the "Mandate") as
7 an instruction to deny McGuireWoods attorneys' fees under the authority of *Image*
8 *Tech. Serv. v. Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998) (a Federal case
9 interpreting California law that described its circumstances as "exceptional" four
10 times in the opinion at pp. 1358-59). The Ninth Circuit did not limit the remand for
11 the sole purpose of denying attorneys' fees to McGuireWoods, but rather explicitly
12 instructed this Court to review its previous fee award in light of the Ninth Circuit
13 opinion and California law. Concluding that the record did not reveal whether this
14 Court had considered the incentive agreements in making its fee award, the Ninth
15 Circuit declined to prejudge the fee issue. It acknowledged that it was expressing no
16 opinion on the fee request other than to note that the principles it discussed
17 regarding the incentive agreements were "at least, implicated" on the issue of fees.
18 Accordingly, the Ninth Circuit reversed and remanded the award of attorneys' fees
19 to Class Counsel for this Court's consideration to determine "in the first instance"
20 the effect, "if any," of the incentive agreements on entitlement to fees. *Rodriguez v.*
21 *West Publishing Corp.*, 563 F.3d 948, 967-68 (9th Cir. 2009).

22 The record before this Court of the extensive work McGuireWoods
23 performed in achieving what this Court and the Ninth Circuit recognized as a fair
24 settlement for the Class in this common fund case weighs substantially and
25 equitably in favor of an award of attorneys' fees to McGuireWoods. California law
26 does not compel forfeiture, and indeed permits the award of attorneys' fees
27 notwithstanding a conflicted representation, especially where as here the apparent
28 conflict is harmless. McGuireWoods respectfully requests that the Court reconsider

1 its Order and reinstate a fee award for its extensive and valuable services as Class
2 Counsel.

3 **II. STANDARD OF REVIEW**

4 Local Rule 7-18 sets forth the bases upon which this Court may reconsider a
5 previous order. The Rule provides as follows:

6 A motion for reconsideration of the decision on any
7 motion may be made only on the grounds of (a) a material
8 difference in fact or law from that presented to the Court
9 before such decision that in the exercise or reasonable
10 diligence could not have been known to the party moving
11 for reconsideration at the time of such decision, or (b) the
12 emergence of new material facts or a change of law
13 occurring after the time of such decision, or (c) a manifest
14 showing of a failure to consider material facts presented to
15 the Court before such decision.

16 L.R. 7-18. McGuireWoods requests that the Court grant reconsideration under
17 section (c).

18 **III. THE NINTH CIRCUIT DID NOT MANDATE FORFEITURE OF**
19 **MCGUIREWOODS' FEES**

20 The Ninth Circuit remanded the issue of Class Counsel's fees to this Court to
21 factually determine what effect, "if any", the incentive agreements had upon the fee
22 award to Class Counsel under California law. *Rodriguez*, 562 F.3d at 969 (emphasis
23 added). Rather than an instruction to deny fees to McGuireWoods, the Ninth
24 Circuit's Mandate sought confirmation that there was adequate support in the record
25 for the Court's decision to award attorneys' fees to Class Counsel in light of the
26 incentive fee agreements with certain Class Representatives, and expressly provided
27 for supplementation of the record, if necessary.

28

1 If the Ninth Circuit had determined or believed that automatic forfeiture of
2 McGuireWoods' fees was required, there would have been no need to remand the
3 case for further consideration of this issue; the Ninth Circuit simply could have and
4 would have reversed and directed that the fees be denied. The fact that the Ninth
5 Circuit instead confirmed the Settlement but remanded for further consideration of
6 the fee issue means that the Ninth Circuit did not believe that *Image Tech* was either
7 conclusive of California law or required automatic forfeiture of fees.¹ The Ninth
8 Circuit, in fact, expressly declined to offer an opinion on what effect the incentive
9 agreements should have on the fee award to Class Counsel, deferring that decision
10 "in the first instance" for determination by this Court on an adequate factual record.
11 *Rodriguez*, 563 F.3d at 968. While we believe the Court had more than adequate
12 support for its original decision awarding fees, that support may not have been
13 sufficiently "visible" to the Ninth Circuit in the Court's order. Very clearly,
14 however, there are no facts in the record that would justify an automatic forfeiture of
15 fees, and no factual record has been developed that would support a reversal of this
16 Court's original attorney fee decision. To the contrary, the Class has benefitted
17 substantially from the efforts of McGuireWoods, as the Ninth Circuit acknowledges,
18 and the record is free from any implication of "taint" on any of McGuireWoods'
19 work for the Class.

20
21
22 ¹ *Image Tech*, by its own description, is an "exceptional" case. In the final
23 sentence of the opinion, the Ninth Circuit says: "In these exceptional circumstances
24 Kodak need not pay Image Tech the \$400,000 fee for Coudert's services." Its
25 suggestion of an automatic forfeiture rule in California is not supported by
26 California cases. See *Cal-Pak* 52 Cal.App.4th 1, 60 Cal. Rptr. 2d 207 (Cal. Ct. App.
27 1997), *Mardirossian & Assoc. v. Ersoff*, 153 Cal.App.4th 257, 62 Cal. Rptr. 3d 665
28 (Cal. Ct. App. 2007) *Sullivan v. Dorsa*, 128 Cal.App.4th 947, 27 Cal. Rptr. 3d 547
(Cal. Ct. App. 2005), *Pringle v. La Chapelle*, , 73 Cal.App.4th 1000, 87 Cal. Rptr.
2d 90 (Cal. Ct. App. 1999).

1 **IV. THE COMMON FUND DOCTRINE REQUIRES APPLICATION OF**
2 **EQUITABLE PRINCIPLES AND COMPENSATION FOR**
3 **MCGUIREWOODS**

4 In common fund cases such as this, equity is the basis for the award of
5 attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). There is
6 no contract with the Class that requires payment, and the award here is not being
7 requested under the automatic "fee-shifting" provision of the antitrust statutes which
8 raised the unique facts and issues of the *Image Tech* case.² Rather, the basis for fees
9 in a common fund case is the recognition that it would be unjust enrichment for the
10 Class to obtain a benefit without compensating the attorneys for their work in
11 achieving that benefit. *Id.* at 478.

12 **A. McGuireWoods Performed Significant, Valuable, Productive**
13 **Work on Behalf of the Class Yielding a Substantial Benefit in**
14 **Favor of the Class**

15 This case was at all times vigorously prosecuted and the equities significantly
16 weigh in favor of an award of attorneys' fees to McGuireWoods for the extensive,
17 valuable work it performed on behalf of the Class, including:

- 18 (1) factual investigation concerning the alleged conspiracy between Kaplan
19 and BAR/BRI;
- 20 (2) preparing the class complaint;
- 21 (3) extensive work and legal research in preparing all briefs and memoranda,
22 including Opposition to the Motion to Transfer Venue, the Motion for Class
23

24 ² If it were a fee-shifting case, counsel could also seek compensation for
25 the effort expended in making a fee application, which did not happen here. In
26 "common fund" cases such as this, courts hold that attorneys may not seek
27 compensation for the *effort* in making a fee request, because the fees are paid by the
28 class, not the losing party.

1 Certification, Discovery Motions before the Special Discovery Master, Opposition
2 to Kaplan's Motion for Summary Judgment, Motion for Preliminary Approval, and
3 Motion for Final Approval;

4 (4) coordination of and primary responsibility for all discovery issues,
5 including seeking the appointment of special master, work with all experts,
6 electronic discovery, voluminous written discovery, review of in excess of half a
7 million documents, and taking and defending approximately 30 depositions all
8 across the country;

9 (5) preparation of the Memorandum of Law and Fact and Final Pretrial
10 Conference Order;

11 (6) engaging in mediation and settlement negotiations;

12 (7) conducting weekly strategy conference calls with co-counsel to allocate
13 work and draw on each firm's available time and particular expertise;

14 (8) preparing for and attending numerous hearings before this Court and the
15 Special Discovery Master;

16 (9) trial preparation, including motions in *limine* and work before a mock
17 jury;

18 (10) responding to objectors challenging the fairness, adequacy and
19 reasonableness of the Settlement before this Court, including three rounds of
20 briefing;

21 (11) successfully defending against numerous appeals by objectors, including
22 responding to six appellate briefs challenging the fairness, adequacy and
23 reasonableness of the Settlement before the Ninth Circuit Court of Appeals; and

24 (12) significant work with the Claims Administrator to resolve claims issues
25 and disputes.

26 The record in this case contains an exhaustive documentation of
27 McGuire Woods' work on behalf of the Class, *see, e.g.*, Docket Entries 79, 80, 98,
28 107, 109, 134, 153, 176, 177, 244, 272, 274, 368, 371. The firm's work yielded a

1 significant benefit to the Class in the form of a \$49 million Settlement Fund. The
2 extent and importance of the contributions of McGuireWoods to this successful
3 outcome are uncontroverted. This Court recognized the "extent of protracted and
4 contentious discovery" in which McGuireWoods represented the interests of the
5 Class. *See Opinion and Order* dated September 10, 2007 at 13. It would be
6 inequitable and contrary to the current state of California law to allow those
7 contributions to go uncompensated.

8 To the extent the Ninth Circuit is simply seeking confirmation regarding the
9 nature and extent of these contributions by McGuireWoods, or more specific
10 findings by this Court regarding the nature and extent of McGuireWoods' efforts on
11 behalf of the Class, the record is more than adequate for the Court to provide that
12 confirmation. However, the Ninth Circuit has invited this Court to supplement the
13 record if it believes further factual support is needed. In either event, the facts in the
14 record plainly support an award of fees to McGuireWoods, and there is no factual or
15 legal basis justifying a denial of fees.

16 **B. A Conflict that Caused No Harm Does Not Support the Retroactive**
17 **Punishment of McGuireWoods**

18 The state of the law at the time the incentive agreements were entered and at
19 the time they were considered by this Court and the Ninth Circuit did not prohibit
20 such agreements. As this Court recognized, there was no precedent barring the
21 incentive agreements entered into here, and "some commentators have opined that
22 such agreements might be acceptable." *See Opinion and Order* dated September 10,
23 2007 at 27, citing Clinton A. Krislov, *Scrutiny of the Bounty, Incentive Awards for*
24 *Plaintiffs in Class Litigation*, 78 Ill. B.J. 286, 290 (1990). While the subsequent
25 finding by this Court and the Ninth Circuit that such agreements are inappropriate
26 provides guidance going forward, it should not be the basis for a retroactive
27 punishment in the form of a denial of fees to McGuireWoods when both this Court
28 and the Ninth Circuit explicitly found that: (1) the case was vigorously prosecuted;

1 (2) the Settlement was fair, adequate and reasonable; (3) Class Counsel was
 2 adequate; and (4) the purported conflict was harmless. *See Opinion and Order*
 3 dated September 10, 2007 at 18-20; *Rodriguez*, 563 F.3d at 961. Denial of fees
 4 clearly is not required by California law and without a factual basis for concluding
 5 that Class Counsel engaged in "egregious" conduct causing harm to the Class, there
 6 is no basis under California law for denying fees.

7 **C. An Award of Attorneys' Fees to McGuireWoods is Proper Under**
 8 **the Mandate and California Law**

9 California courts have explicitly held that equitable principles determine
 10 whether a fee award is appropriate where attorneys have provided conflicted
 11 representation. In *Cal-Pak Delivery v. UPS*, 52 Cal.App.4th 1, 60 Cal. Rptr. 2d 207
 12 (Cal. Ct. App. 1997), for example, after surveying cases "that articulate the rule that
 13 a court may prevent counsel's recovery of fees from the client where the attorney
 14 has violated ethical rules," the California Court of Appeal noted that the articulated
 15 rule was certainly not automatic or devoid of equitable considerations:

16 However, the appellate courts in all three of the above
 17 cases allowed partial fee recovery or acknowledged that
 18 some fees could be recovered by the attorney: (1) where
 19 there was no objection by the client (*Clark v. Millsap*,
 20 *supra*, 197 Cal. 765); (2) for services rendered before the
 21 ethical breach (*Jeffry v. Pounds*, *supra*, 67 Cal. App. 3d 6);
 22 or (3) **on an unjust enrichment theory where the**
 23 **client's recovery was a direct result of the attorney's**
 24 **services** (*Estate of Falco*, *supra*, 188 Cal. App. 3d 1004).

25 60 Cal. Rptr. 2d at 216 (emphasis added).

26 Subsequent California cases confirm that equity will allow compensation to
 27 attorneys who provide substantial benefits to the client even if there was found to be
 28 a conflict of interest in the representation. These cases explicitly reject the notion

1 that any conflict of interest requires an automatic forfeiture of fees. *See, e.g.,*
2 *Mardirossian & Assoc. v. Ersoff*, 153 Cal.App.4th 257, 279 62 Cal. Rptr. 3d 665,
3 683 (Cal. Ct. App. 2007) (denying forfeiture of fees because challenger "has not
4 shown the violation was particularly egregious or that he was in any way prejudiced
5 by it"); *Sullivan v. Dorsa*, 128 Cal.App.4th 947, 965, 27 Cal. Rptr. 3d 547, 561 (Cal.
6 Ct. App. 2005), (Cal. Ct. App. 2005) (awarding fees because challenger "fail[ed] to
7 show that any violation of the rules governing representation of adverse interests
8 was *serious* enough to *compel* a forfeiture of fees") (emphasis in original); *Pringle*
9 *v. La Chapelle*, 73 Cal.App.4th 1000, 1006, 87 Cal. Rptr. 2d 90, 94 (Cal. Ct. App.
10 1999) (California law requires that there be a "serious violation of the attorney's
11 responsibilities before an attorney who violates an ethical rule is required to forfeit
12 fees."). To the extent *Image Tech* might appear to the contrary, it is superseded by
13 the cases set forth above. *See Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th
14 Cir. 2008) (the Ninth Circuit's interpretations of state law are "only binding in the
15 absence of any subsequent indication from the California courts that our
16 interpretation was incorrect.").

17 Thus, under California law, the question framed by the Ninth Circuit's
18 Mandate is to determine whether – and if so, how – the incentive agreements
19 affected Class Counsel's equitable entitlement to fees that derive from the
20 substantial benefits Class Counsel's efforts have conferred on the Class (here the
21 \$49 million Settlement Fund). The issue, as the Ninth Circuit instructed, is to be
22 decided by California law, and California courts analyze the effect of a conflict of
23 interest on attorneys' fees by focusing on equitable principles: the egregiousness of
24 the conduct, the harm suffered, and if (and only if) there is harm, whether a remedy
25 such as disgorgement is necessary to compensate for it.

26 An award of attorneys' fees to McGuireWoods for its extensive, productive
27 work on behalf of the Class is entirely proper under the standards articulated by the
28 California courts.

1 First, there clearly was no egregious conduct by McGuireWoods. The
2 incentive agreements were entered into by a lawyer before he joined
3 McGuireWoods. At the time the agreements were entered into, this type of
4 agreement had not been found by any court to be inappropriate. More importantly,
5 the incentive agreements were not concealed. They were produced to defendants
6 during discovery and the Class Representatives were extensively questioned about
7 them at deposition. In addition, defendants, who strenuously opposed class
8 certification, did not challenge the adequacy of the Class Representatives or Class
9 Counsel based upon the incentive agreements.³ The fact that there was no challenge
10 to the adequacy of the Class Representatives on this issue despite extensive
11 questioning about the fee agreements during depositions is a primary reason why the
12 agreements did not come up during the class certification hearings. Any incentive
13 payments, moreover, always were subject to approval by the Court.

14 Second, there just as clearly was no harm to the Class. To the contrary, a
15 settlement far in excess of \$10 million, the upper limits on the sliding scale in the
16 incentive agreements, was reached.⁴ The Ninth Circuit not only expressly found
17 that the presence of the conflicted Class Representatives was **harmless** and that
18 Class Counsel was adequate, *Rodriguez*, 563 F.3d at 961, but also that the
19 Settlement was at arms' length and fair "[b]y any measure." *Id.* at 968. This Court
20

21
22 ³ This is likely because the state of the law at the time arguably permitted
23 such agreements. *See Opinion and Order* dated September 10, 2007 at 27, citing
24 Clinton A. Krislov, *Scrutiny of the Bounty, Incentive Awards for Plaintiffs in Class
Litigation*, 78 Ill. B.J. 286, 290 (1990).

25 ⁴ In fact the Ninth Circuit's concerns about the potential negative effects of the
26 incentive agreements did not occur in this case. The incentive award agreements did
27 not cause the three non-settling Class Representatives to urge settlement rather than
28 trial. It was just the opposite. Although the Settlement far exceeded the top end of
the sliding scale, the non-settling defendants urged trial rather than settlement.

1 also specifically found Class Counsel's representation to be adequate. *See Opinion*
2 *and Order* dated September 10, 2007 at 20. Without any harm, there simply is no
3 basis for a forfeiture of fees under California law.

4 **D. The Inequity of Denying McGuireWoods Fees is Demonstrated by**
5 **McGuireWoods' Continuing Service to the Class**

6 The inequity of denying fees to McGuireWoods is highlighted by the firm's
7 continuing service to the Class from July 2007 to the present – when any possible
8 taint of conflict was removed. Once this Court approved the Settlement and denied
9 the incentive awards in July 2007, any "conflict" between the Class Representatives
10 and the Class evaporated. Put slightly differently, there was no conflict between the
11 Class Representatives and the other members of the Class – thus no conflicting
12 representation – after the incentive agreements were nullified. McGuireWoods
13 continued to represent the Class, including successfully defending the Settlement
14 that the Court believed –and that the Ninth Circuit affirmed – was an excellent result
15 for the Class. Nevertheless, the Court's Order would deny fees even for
16 McGuireWoods' continuing representation of the Class.

17 After the denial of incentive awards during the final approval process, the
18 representation of McGuireWoods could not have been "conflicted." If this Court or
19 the Ninth Circuit thought otherwise, there were ample opportunities to remove
20 McGuireWoods as Class Counsel, something both Courts declined to do. Indeed,
21 during the final approval process, certain Objectors sought to remove
22 McGuireWoods. This Court rejected their arguments and affirmed McGuireWoods'
23 continuing representation of the Class. The Ninth Circuit never questioned that
24 decision, instead finding Class Counsel "adequate." *See Opinion and Order* dated
25 September 10, 2007 at 20, *Rodriguez*, 563 F.3d at 961.

26 McGuireWoods has continued to work diligently on behalf of the Class and it
27 should be compensated for those services.

1 **V. CONCLUSION**

2 Based on the foregoing, McGuireWoods respectfully requests that this Court
3 reconsider its Order of February 3, 2010, re-examine the Mandate and grant
4 McGuireWoods attorneys fees for legal services rendered on behalf of the Class.

5
6 DATED: February 5, 2010

Respectfully submitted,

7 MCGUIREWOODS LLP

8
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