

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

Consolidated Appeals

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

RYAN RODRIGUEZ, et al.,
Class Plaintiffs-Appellees

and

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

vs.

GEORGE SCHNEIDER, 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)

**CLASS PLAINTIFFS-APPELLEES' MOTION TO SUPPLEMENT
RECORD**

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I. INTRODUCTION

By this motion, Class Plaintiffs-Appellees (“Plaintiffs-Appellees”) seek to supplement the appellate record with a declaration from Rick Sartory (the “Sartory Declaration” or “Sartory Decl.”), the Senior Project Manager of Complete Claim Solutions, LLC (“CCS”) the court appointed Claims Administrator.¹

The evidence set forth in the Sartory Declaration renders the *cy pres* arguments made by certain Appellants (the “*Cy Pres* Appellants”) moot. This evidence goes directly to some of the issues on 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), a class action settlement for \$49 million and other valuable non-monetary relief (“Approval Order”).

Under the terms of the Settlement, Authorized Claimants will receive a *pro rata* share of the \$49 million cash component of the

¹ 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”), SER 1487- 1517. (“SER __” refers to the Supplemental Excerpts of Record concurrently filed with Briefs of Plaintiffs-Appellees. “FER __” refers to the Excerpts of Record filed by Appellants David Feldman, Cameron Gharabiklou, Emily Grant, Sarah McDonald, Cara Patton, Rachel Schwartz and Greg Thomas.)

Settlement based on the amount Authorized Claimants paid for each bar review course up to 30% of the amount each Authorized Claimant paid for each bar review course. A *cy pres* provision distributes any money remaining in the Net Settlement Fund to a *cy pres* recipient approved by the District Court.

The Sartory Declaration establishes that the 30% cap and *cy pres* provisions of the approved Settlement Agreement will never take effect, rendering the *Cy Pres* Appellants' arguments on this point moot. The data establishing this evidence was unavailable at the time of the Approval Order because the deadline for filing Claim Forms had not expired and the Claims Administrator had not completed the processing and auditing of the Claim Forms.

According to the Sartory Declaration, as of October 1, 2008, CCS received approximately 88,000 Claim Forms. The Claim Forms reflect a total of 124,053 BAR/BRI review courses purchased. The Claim Forms also reflect a total of approximately \$226,932,443 in BAR/BRI course review purchases (the "Relevant Purchases"). Of these Relevant Purchases, CCS has determined that, at least,

\$196,489,263 are valid and undisputed claims.² Thirty percent of \$196,489,263 is \$58,946,779 – more than the **entire** amount of the Settlement Fund and certainly more than the Net Settlement Fund (the Settlement Fund after expenses and attorneys’ fees) which will be available for distribution to Authorized Claimants.

Pursuant to its inherent equitable powers and under Rule 10(e), this Court has the discretion to supplement the record with this evidence that renders the *cy pres* argument on appeal moot. Accordingly, Plaintiffs-Appellees respectfully request that the Court grant this motion.

II. FACTUAL AND PROCEDURAL SUMMARY

The principal terms of the Settlement included Defendants’ agreement to pay \$49 million into the Settlement Fund. FER 76. The Settlement also provided that the Net Settlement Fund would be distributed to Authorized Claimants *pro rata* based on the amount each Authorized Claimant paid for the Relevant Courses, up to a

² CCS is continuing to evaluate the other claims and has determined that there is \$30,443,180 in unresolved claims due to a variety of deficiencies. *See* Sartory Decl., ¶ 6. These deficiencies can be resolved pursuant to the terms of the Settlement Agreement following the mailing of deficiency letters to the appropriate claimants. Thus, the total value of valid claims could be as much as \$226,932,443 further reducing the likelihood of a *cy pres* distribution.

maximum of 30% of the price paid. *Id.* Under the Settlement, Defendants have no reversionary rights to any remainder in the Net Settlement Fund; rather, any remainder after the *pro rata* payments would be distributed to a *cy pres* recipient approved by the District Court. FER 77.

The *Cy Pres* Appellants argued below that the 30% cap and *cy pres* provisions were improper and rendered the Settlement inadequate. The District Court approved the Settlement as fair, reasonable and adequate and rejected these arguments, finding that the possibility of a cap on individual recovery resulting in a *cy pres* award did not render the Settlement inadequate. SER 77. Further, the District Court found that the 30% cap did not create a benefit for Defendants, as any money remaining in the Net Settlement Fund would be distributed to a *cy pres* recipient as approved by the Court. *Id.*

The record shows that at the time the District Court approved the Settlement, the Claims Administrator received and processed approximately 34,323 Claim Forms. SER 178. These claims reflected a total amount of \$77,161,734 paid for bar review courses. *Id.*

The Cy Pres Appellants re-assert in their appeal that the cap and cy pres provisions are unfair and inadequate and request that the Court overturn the Settlement.

III. LEGAL STANDARD

Rule 10(e) of the Federal Rules of Appellate Procedure governs the correction and modification of the appellate record. According to Rule 10(e), disputes about the record must be resolved by the District Court. Fed. R. App. Proc. 10(e)(1). Material omissions or misstatements in the record as a result of error or accident may be corrected upon stipulation, by the District Court or the Court of Appeals. Fed. R. App. Proc. 10(e)(2). All other questions as to form and content must be submitted to the Court of Appeals. Fed. R. App. Proc. 10(e)(3).

Moreover, pursuant to their inherent equitable powers, the federal courts of appeal have the discretion to supplement the record on appeal as justice requires. *See Dickerson v. State of Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982) (supplementing record with evidence not reviewed by the court below because the evidence was necessary for the proper resolution of the case and remand to consider additional facts would be contrary to both the interests of justice and

the efficient use of judicial resources). These inherent equitable powers include the discretion to supplement the record with evidence that was not before the district court.³ *Id.*; *see also Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) (in the interests of justice, granting motion to supplement record with evidence from transcript not presented to district court or otherwise part of record on appeal).

The appellate record here is unavoidably incomplete and the interests of justice mandate that the Sartory Declaration be permitted to complete the record.

IV. ARGUMENT

As discussed in Section II above, the record reflects that at the time the District Court entered the Approval Order – September 10, 2007 – the deadline to submit Claim Forms had not expired. Since that date, the number of valid claims has more than doubled. It would

³ The Ninth Circuit normally will not supplement the record with evidence that was not presented to the District Court. *See, e.g., Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987) (declining to supplement record with evidence not before District Court where evidence could have been developed and presented to District Court). In this appeal, however, Plaintiffs-Appellees did not have the opportunity to develop the evidence they ask the Court to consider in this appeal and thus could not have presented it to the District Court.

be a miscarriage of justice to preclude such relevant information from the record on appeal here.

Now that the deadline for filing Claim Forms has expired and the Claims Administrator has processed and audited the Claim Forms, CCS has determined that approximately 88,000 Claim Forms have been submitted, reflecting \$226,932,443 of Relevant Purchases, of which \$196,489,263 represent valid claims. Sartory Decl., §§ 3-5.

Pursuant to Rule 10(e)(2), this Court may supplement the record with evidence to accurately reflect the data relating to the number of Claim Forms submitted and the Relevant Purchases, which is material to the parties' arguments on appeal. *See M.L. v. Federal Way School Dist.*, 394 F.3d 634, 641 n.8 (9th Cir. 2005) ("Rule 10(e) . . . allows the record to be corrected if 'anything material to either party is omitted from or misstated in the record by error or accident'").

Further, as in *Dickerson*, supplementing the record in this appeal with the current number of valid Claim Forms and their total Relevant Purchases serves the interest of justice.

First, proper resolution of the substantive issues in this Action – whether this Court should reverse the Approval Order on the grounds

that the cap and *cy pres* provisions are improper under Appellants' authority⁴ – should be considered in light of all available facts, including the number of valid Claim Forms that have been submitted and the resulting aggregate Relevant Purchases. Although Plaintiffs-Appellees believe the District Court's order approving the Settlement is consistent with the principles set forth in *Six Mexican Workers and Masters*, even if the *Cy Pres* Appellants are correct, it would be a waste of judicial resources to remand the Settlement to the District Court as the *Cy Pres* Appellants insist, since the cap and *cy pres* provisions are moot.

Second, remanding the Settlement on the grounds that the cap and *cy pres* provisions are unfair, inadequate and unreasonable based on the current record would be contrary to the efficient use of judicial resources and would be detrimental to the Class. Should the Court remand the Settlement to the District Court on account of the cap and *cy pres* provisions, the District Court, confronted with evidence of the number of valid Claim Forms and the aggregate Relevant Purchases

⁴ See, e.g., *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); and *Masters v. Wilhelmina Model Agency*, 473 F.3d 423 (2d Cir. 2007).

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