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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

-----X
RYAN RODRIGUEZ, REENA B. :
FRAILICH, LOREDANA NESCI, :
JENNIFER BRAZEAL, and LISA :
GINTZ, on behalf of themselves and all :
others similarly situated, :
 :
Plaintiffs, :
 :
v. :
 :
WEST PUBLISHING CORP., a :
Minnesota corp. d/b/a BAR/BRI, and :
KAPLAN, INC., a Delaware corp., :
 :
Defendants :
-----X

CASE NO. CV-05-3222 R(MC_x)

**OPPOSITION TO CLASS
COUNSEL'S MOTIONS FOR
RECONSIDERATION**

Date: March 14, 2010
Time: 10:00 am
Courtroom: 8
Judge: Hon. Manuel Real

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INTRODUCTION

Robert J. Gaudet, Jr. and Sandeep Gopalan (hereinafter “we” or “us”) submit this opposition to Class Counsel’s motions for reconsideration (Dkt. 631; Dkt. 632; Dkt. 642). Because the Zwerling and Finkelstein firms requested hourly rates that were two to four times higher than prevailing market rates, this Court was within its discretion in making a reduction of 37 percent in attorney’s fees through eliminating the 1.43 lodestar multiplier and reducing the lodestar by 10 percent. The pending motions should be denied in their entirety because all three firms fail to meet the legal standard for a motion for reconsideration. There are no new material facts or arguments that were not previously known to Class Counsel at the time this Court decided their awards. There is no evidence that the Court failed to consider any material facts for the simple reason that Class Counsel have not identified any material facts that the Court failed to consider at the time of its decision. The Zwerling and Finkelstein firms had opportunities to make arguments regarding the interpretation of their time sheets, but they failed to do so. A motion for reconsideration does not present a new opportunity to re-argue a settled issue. Even if it did, the Zwerling and Finkelstein firms have failed to address the basic fact that their requested hourly rates were quadruple or double the prevailing market rates. With such high rates, the Court could have reduced their attorney’s fees by 50 percent reduction, much less a modest 37 percent.

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ARGUMENT

I. Legal Standard.

This Court is not required to “address an issue raised for the first time in a motion for reconsideration.” *389 Orange Street Partners v. Arnold*, 179 F.3d 656,

1 665 (9th Cir. 1999). Because a “motion for reconsideration should not be granted,
2 absent highly unusual circumstances,” the pending motions should be denied for
3 failing to meet their burden. *Metoyer v. Chassman*, 248 Fed. Appx. 832, 835 (9th
4 Cir. 2007). The pending motions are governed by Local Rule 7-18 which states:

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

14 Class Counsel move under Local Rule 7-18(c) but the Finkelstein and Zwerling
15 firms’ arguments fall under Local Rule 7-18(a) because they offer new interpretations
16 as to the “true” meaning of their time sheets. They cannot show that their new
17 interpretations were not known, or could not have been known, prior to the Court’s
18 decision on December 7, 2009.¹ McGuireWoods recites the same arguments as
19 previously so its argument does not fall under Local Rule 7-18 (a), (b), or even (c)
20 since it does not identify any “material facts” that the Court failed to consider.

21 **II. Because the Zwerling and Finkelstein Firms Asked For Payment of**
22 **Quadruple or Double Hourly Rates and Non-Compensable Hours, the**
23 **Court’s 37 Percent Reduction Was Modest.**

24 The Court’s explanation as to why it reduced the lodestar and eliminated the
25 multiplier for the Zwerling and Finkelstein firms (Dkt. 630, at 7-8) was “concise but
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27 ¹ *Metoyer v. Chassman*, 248 Fed. Appx. 832, 835 (9th Cir. 2007) (affirming court’s denial of motion for reconsideration
28 where movant received audiotape evidence five days after judgment but movant “failed to make a sufficient showing
that the information contained in the tape could have not been discovered with reasonable diligence); *389 Orange
Street*, 179 F.3d at 665.

1 clear,” as required by the Supreme Court. *Hensley v. Eckerhart*, 461 U.S. 424, 437
2 (1983). The Court acted within its discretion by reducing attorney’s fees by a modest
3 37 percent when the firms asked for payment of hourly rates that were double or
4 quadruple the prevailing market rates. Had it desired, the Court could have reduced
5 attorney’s fees up to 50 percent instead of a modest 37 percent.

6 **A. The Firms Cannot Offer New Interpretations of Their Time Sheets,**
7 **at This Late Stage, When They Could Have Submitted the**
8 **Arguments Prior to the Court’s Determination.**

9 The Zwerling and Finkelstein firms cannot use a motion to reconsider as an
10 opportunity to provide new interpretations (Dkt. 642, at 8-11) of time sheets since
11 they had access to this information at the time of the Court’s decision.² The firms
12 have not identified a single piece of the record that was previously mentioned to the
13 Court but which this Court disregarded. Their new interpretations of time sheets
14 (Dkt. 642, at 8-11) were not included in the reply brief filed on October 26, 2009
15 (Dkt. No. 598) or in the declarations attaching time sheets filed on November 13,
16 2009 (Dkt Nos. 603-605) or in their oral argument on December 7, so their new
17 interpretations cannot form the basis for reconsideration under Local Civil Rule 7-
18 18(c). Their new interpretations are “simply too little, too late,”³ and they fail to meet
19 the burden under Local Rule 7-18(c).
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22 ² See 389 *Orange Street*, 179 F.3d at 665 (holding district court cannot be reversed “for declining to address an issue
23 raised for the first time in a motion for reconsideration”); *Metoyer v. Chassman*, 248 Fed. Appx. 832, 835 (9th Cir. 2007)
24 (“Evidence is not newly discovered if it was in the party’s possession at the time of the summary judgment or could
25 have been discovered with reasonable diligence”) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir.
26 1994)); *Millett v. Experian Info. Solutions, Inc.*, 319 Fed. Appx. 562, 563 (9th Cir. March 13, 2009) (affirming district
27 court’s refusal to consider consumer survey evidence that was not “new evidence” as required by Local Rule 7-18);
28 *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262-1263 (9th Cir. 1993) (affirming district
court’s refusal to consider 21,000 pages of new documentary evidence put forward to support motion for
reconsideration but not previously submitted to district court) (“The overwhelming weight of authority is that the failure
to file documents in an original motion or opposition does not turn the late filed documents into ‘newly discovered
evidence’”).

³ 389 *Orange Street*, 179 F.3d at 665 (“All Robinson was required to do was present some timely legal argument to the
district court ... In all of the pleadings, motions, and memoranda filed with the district court leading up to summary
judgment, Robinson failed to do so”) (affirming district court’s refusal to consider new argument on motion for
reconsideration).

1 This Court was entitled to reduce their lodestar by 10 percent based without a
2 more specific explanation of the facts that were before it at the time of its decision.⁴
3 In addition, the Court acted within its discretion by eliminating the lodestar multiplier
4 due to excessive rates (Dkt. 607, at 18-22). No new facts or law have emerged since
5 December 7 to justify reconsideration under Local Rule 7-18(a) or (b). Class
6 Counsel's new interpretations of their time sheets (Dkt. 642, at 8-11) are based on
7 information that was known to them prior to December 7. They had access to this
8 information at the time of the Court's decision and could have made these arguments
9 earlier. Consequently, the firms cannot avail themselves of Local Rule 7-18(a) or (b).

10 **B. Because the Finkelstein and Zwerling Firms Requested Payment of**
11 **Rates That Were Quadruple or Double the Prevailing Market Rates,**
12 **a 37 Percent Reduction Was Within the Court's Discretion.**

13 Because the rates requested were *quadruple or double the rates* permitted by
14 law (Dkt. 607, at 18-21), a reduction in attorney's fees of 37 percent was within this
15 Court's discretion.⁵ The Court could have reduced their fees by 50 percent or more.⁶

16 The rates requested by the Finkelstein and Zwerling firms were excessive as follows:
17 (a) four times higher than the prevailing market rate in San Francisco for associates;⁷
18 (b) two times higher than the prevailing market rate in Washington, D.C. for
19 partners;⁸ (c) two times higher than the prevailing market rate in Los Angeles for

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21 4 *Moreno v. City of Sacramento*, 534 F.2d 1106, 1112 (9th Cir. 2008) ("the district court can impose a small reduction
22 [to the number of hours], no greater than 10 percent- a 'haircut' - based on its exercise of discretion and without a more
23 specific explanation"); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972) (affirming district
24 court's right to reduce plaintiff's statutory attorney's fee request by more than two-thirds, or more than 67 percent,
25 without stating any reasons).

26 5 *Moreno*, 534 F.3d at 1111 (affirming court's discretionary right to set hourly rate, based on prevailing market rate, for
27 victorious plaintiff seeking statutory attorney's fees); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008
28 (9th Cir. 1972) (affirming district court's right to reduce plaintiff's statutory attorney's fee request by more than two-
thirds, or more than 67 percent, without stating any reasons) ("The court stated no reasons for allowing less than one-
third of the claimed fees, but it was not required to do so").

6 *Galdamez v. Potter*, 2007 WL 845914, *3 (D. Or. March 15, 2007) (supporting proportional reduction in fee request).
7 Dkt. 607, at 18 (noting prevailing market rate of \$115/hour in comparison to requested rate of \$450/hour). When we
divide \$450 by \$115, the result is 3.9, showing that the requested rate for Bartholomew is nearly four times higher than
the legal rate. Such a high rate justifies the Court in reducing attorney's fees by up to 75 percent to bring the excessive
in lines with reality.

8 Dkt. 607, at 18 (noting prevailing market rate of \$425/hour in comparison to requested rate of \$825/hour), 21 (same).
When we divide \$825 by \$425, the result is 1.9 showing that the requested rate for Burton and Thompson is nearly
twice as high as the legal rate. Such a high rate justifies the Court in reducing attorney's fees by up to 50 percent.

1 partners;⁹ (d) two times higher than the prevailing market rate in Seattle for
2 partners;¹⁰ (e) two times higher than the prevailing market rate in Washington, D.C.
3 for paralegals;¹¹ (f) two times higher than the prevailing market rate in Richmond,
4 Virginia for partners;¹² (g) two times higher than the prevailing market rate in New
5 York City for partners or senior lawyers;¹³ (h) two times higher than the prevailing
6 market rate in Chicago for partners;¹⁴ and (i) two times higher than the prevailing
7 market rate in McLean, Virginia (or Washington, D.C.) for partners.¹⁵

8 Based on the excessive rates (Dkt. 607, at 18-21), all of which have been
9 unaddressed by Class Counsel, this Court would have been justified in further
10 reducing rates as follows: (a) 75 percent for San Francisco associates; (b) 50 percent
11 for partners in Washington, D.C.; (c) 50 percent for partners in Los Angeles; (d) 50
12 percent for partners in Seattle; (e) 50 percent for paralegals in Washington, D.C.; (f)
13 50 percent for partners in Richmond, Virginia; (g) 50 percent for partners or senior
14 lawyers in New York City; (h) 50 percent for partners in Chicago; and (i) 50 percent
15 for partners in McLean, Virginia outside Washington, D.C.

16 The Zwerling and Finkelstein firms' request for excessive rates provided an
17 independent reason for this Court to deny or reduce their attorney's fees. Therefore,
18 the Court's reduction of the Zwerling and Finkelstein firms' fees by a mere 37
19 percent¹⁶ was modest and reasonable given the excessive rates built into their

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21 9 Dkt. 607, at 19 (noting prevailing market rate of \$640/hour in comparison to requested rate of \$400/hour). When we
22 divide \$640 by \$400, the result is 1.6, showing that the requested rate for Disner is nearly double the legal rate.
23 10 Dkt. 607, at 19 (noting prevailing market rate of \$300/hour in comparison to requested rate of \$550/hour). When we
24 divide \$550 by \$300, the result is 1.8, showing that the requested rate for Drachler is double the legal rate.
25 11 Dkt. 607, at 19 (noting prevailing market rate of \$125/hour in comparison to requested rate of \$200/hour). When we
26 divide \$200 by \$125, the result is 1.6, showing that the requested rate for Frierson is double the legal rate.
27 12 Dkt. 607, at 19 (noting prevailing market rate of \$300/hour in comparison to requested rate of \$650/hour). When we
28 divide \$650 by \$300, the result is 2.2, showing that the requested rate is double the legal rate.
13 Dkt. 607, at 20 (noting prevailing market rate of \$350/hour in comparison to requested rate of \$550/hour). When we
divide \$550 by \$350, the result is 1.6, showing that the requested rate for Lipofsky was double the legal rate.
14 Dkt. 607, at 20 (noting prevailing market rate of \$300/hour in comparison to requested rate of \$575/hour). When we
divide \$575 by \$300, the result is 1.9, showing that the requested rate for Locke was double the legal rate.
15 Dkt. 607, at 20-21 (noting prevailing market rate of \$425/hour in comparison to requested rate of \$635/hour). When
we divide \$635 by \$425, the result is 1.5, showing that the requested rate for Spahn was double the legal rate.
16 Dkt. 642, at 4. The Zwerling and Finkelstein firms do not explain how they reached the figure of 37 percent. We
reached it as follows. Taking the Finkelstein firm's requested lodestar of \$1,775,067.60 (Dkt. 585, at 14; Dkt. 585-4, at
4; Dkt. 627, at 5) and multiplying it by the requested lodestar of 1.43, we get a result of \$2,538,346.70. The 1.43
multiplier is applied under the assumption that McGuireWoods receives fees such that the 25 percent cap must be

1 lodestars.¹⁷ What is notably lacking in the pending motion is any attempt to justify
2 the excessive rates.¹⁸ Instead, the firms have ignored prevailing market rates in the
3 reply filed on October 26, 2009 (Dkt. 598, at 16 – 19) and in the pending motion.

4 **C. This Court Is Not Required to Give Any Reasons For a Ten Percent**
5 **Reduction in Lodestar Hours.**

6 The Court was justified in reducing the Finkelstein and Zwerling firms’
7 lodestar by 10 percent and eliminating the multiplier due to non-compensable time
8 sheets. *Moreno*, 534 F.2d at 1112 (“the district court can impose a small reduction
9 [to the number of hours], no greater than 10 percent- a ‘haircut’- based on its exercise
10 of discretion and without a more specific explanation”).¹⁹ The Zwerling and
11 Finkelstein firms have not addressed the fact that they spent time on matters that did
12 not benefit the Class such as meetings with appellant’s counsel, Public Citizen, to try
13 and convince them to stop representing us on appeal (Dkt. 607, at 13 n.2). Such time
14 conferred no benefit on the Class. This Court was justified in reducing the lodestar
15 due to time spent on Class Counsel’s fee motions as well as for other reasons.²⁰

16 In the pending motion, the Finkelstein and Zwerling firms have admitted that
17 some of their time sheets were erroneous, and they have tried (too late) to excise time
18 expended on their own fees.²¹ They have also admitted that at least three time sheet
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20 respected. To calculate the amount actually granted by the Court to the Finkelstein firm, in December 2009, we
21 multiplied the \$1,775,067.60 lodestar by 0.90 to account for the 10 percent reduction, and we arrived at a figure of
22 \$1,597,560.80 in fees actually granted. Dividing the granted amount by the requested amount of \$2,538,346.70, we
23 discover that the granted amount is 0.63 or 63 percent of the requested amount. Therefore, the reduction in fees to the
24 Finkelstein firm was **37 percent**. The same methodology applies to the Zwerling firm.
25 17 *Hensley*, 461 U.S. at 435-436 (cited in *Galdamez v. Potter*, 2007 WL 845914, *1 (D. Or. March 15, 2007) (“The
26 court may adjust the lodestar ... downward ... if the fee is otherwise unreasonable”) (reducing fees by 20 percent because
27 “plaintiff has included hours not reasonably expended on the litigation”).
28 18 Dkt. 627, at 9, 10 (“The Finkelstein firm did not cite to any legal or published sources in support of these billing
rates”); Transcript of Hearing, Dec. 7, 2009, at 14:14-25, 15: 1-20 (attempting to distinguish cases that we raised with
respect to prevailing market rates but failing to provide any sources, except for one case, in support of requested rates).
19 Dkt. 607, at 8-17 (citing cases); *Hensley*, 461 U.S. at 437-438 (affirming one-third reduction in attorney’s hours to
account for lawyer’s inexperience and failure to keep contemporaneous time records); *Chalmers v. City of Los Angeles*,
796 F.2d 1205, 1213-1214 (9th Cir. 1986) (affirming district court’s reduction in lodestar hours); *Mares v. Credit
Bureau of Raton*, 801 F.2d 1197, 1202-3 (10th Cir. 1986) (affirming district court’s reduction of hours by 77 percent).
20 *Mares*, 801 F.2d at 1206-1207 (upholding district courts’ discretion to deny or grant “fees for establishing fees”)
(quoting another case); *see also* Dkt. 607, at 12-15.
21 *See* Dkt. 642, at 9-10 n.4 (“This entry was included in error and has been excised from the lodestar and hour referred
to herein”).

1 entries, which we previously identified (Dkt. 607, at 13 n.3), reflect work performed
2 on behalf of their own fees (Dkt. 642, at 9). Having made such confessions, they
3 now ask the Court to peruse their time sheets all over again. This Court is “not
4 required to set forth an hour-by-hour analysis of the fee request ... and when faced
5 with a massive fee application has the authority to make across-the-board percentage
6 cuts either in the number of hours claimed or in the final lodestar figure as a practical
7 means of trimming the fat from a fee application.”²²

8 Prior to the Court’s December 7, 2009 order reducing attorney’s fees to the
9 Zwerling and Finkelstein firms, we quoted directly from their time sheets to identify
10 non-compensable work (Dkt. 607, at 10-17). The Court took these time sheets under
11 consideration. As of December 7, Class Counsel did not address the time sheets
12 quoted in our opposition (Dkt. 607, at 10-17) except for conclusory statements
13 asserting that all time was compensable (Dkt. 598, at 15; Dkt. 598-2, at 2-3; Dkt. 598-
14 3, at 2-3; Dkt. 598-4, at 2-3). Class Counsel also had ample opportunity to provide
15 their interpretation of the time sheets at the December 7 hearing (Transcript of
16 Hearing, Dec. 7, 2009 (hereinafter “Tr.”)) where they informed the Court of their
17 views on the time sheets regarding the Park litigation (Tr., at 13:19-25, 14:1-2) but
18 failed to discuss any particular entries. The Court heard these views and took them
19 into account in making its decision.

20 We provided the Court with full quotations from the time sheets mentioning
21 the Park litigation. One of the quotes that we provided from the June 6, 2008 time
22 sheet of Schachter read as follows: “Telephone with DD with respect to *implications*
23 *on* Park case” (quoted in Dkt. 607, at 9) (emphasis added). The Schachter time sheet
24 shows asks for payment for time spent looking at the impact of undefined activity “on
25 Park case”, i.e., on a separate litigation. Looking at the impact of an event “on”
26 another case obviously conferred no benefit on the Class. In the pending motion, the
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28 ²² *Galdamez v. Potter*, 2007 WL 845914, *3 (D. Or. March 15, 2007); *Mares*, 801 F.2d at 1202-3 (“There is no requirement, either in this court or elsewhere, that district courts identify and justify each disallowed hour”).

1 Zwerling firm has provided, for the first time, a new interpretation that Schachter’s
2 time sheet dated June 6, 2008 and every other time sheet referencing the Park
3 litigation actually reflect work performed for the benefit of the *Rodriguez* litigation
4 (Dkt. 642, at 10). However, the Zwerling firm’s new interpretation is precisely the
5 opposite of what the June 6, 2008 time sheet says, regardless of whether the Zwerling
6 firm represented any parties in the *Park* litigation. The Zwerling firm has offered no
7 evidence to support its *ipse dixit* that the firm never “appeared or worked on the *Park*
8 case” (Dkt. 642, at 10). Therefore, this Court did not – and could not - disregard any
9 facts under Local Rule 7-18(c) since those facts were never brought to its attention
10 and, even today, have still not been brought to its attention in the form of evidence.

11 In reducing the attorney’s fee award, the Court previously considered another
12 time sheet that read: “Research re: objectors in Park action” (quoted at Dkt. 607, at
13 8). The Finkelstein and Zwerling firms do not – because they cannot - give an
14 adequate explanation for this time sheet. Clearly, research on objectors in another
15 case did not confer any benefit on Class members. Only work that directly conferred
16 a benefit on the Class is compensable (Dkt. 607, at 10-17 (citing cases)). Class
17 Counsel failed to meet their burden to explain how the *Park* litigation, work on their
18 own fees, research on objectors, and other non-compensable time benefited the
19 Class.²³ If the time sheets were vague in any way, e.g., referring to “attorney’s fees”
20 in a manner that could have been interpreted in two or more different ways (Dkt. 642,
21 at 8-9), then the burden was on the Zwerling and Finkelstein firms to clarify the
22 meaning prior to the Court’s December 7, 2009 order. Despite numerous
23 opportunities in Court filings and at oral argument to provide their own
24 interpretations of the time sheets (Tr., at 13:19-25, 14:1-2; Dkt. 598), the Finkelstein
25 and Zwerling firms failed to give any explanation as to the “true” meaning of the
26 references to “attorney’s fees” or what Schachter meant when he billed the Class for
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28 ²³ See *Hensley*, 461 U.S. at 437; *Mares*, 801 F.2d at 1210 (“It remains counsel’s burden to prove and establish the reasonableness of each dollar, each hour, above zero”).

1 analyzing “implications on Park case.” Class Counsel may not, now, suddenly
2 provide the Court with new interpretations or evidence in support of their denied
3 motion for fees. *See School Dist.*, 5 F.3d at 1263 (citing *Federick S. Wyle Prof’l*
4 *Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)).

5 Because the Finkelstein and Zwerling firms supplied the time sheets, the
6 burden of clarity fell upon them.²⁴ The Court reviewed *verbatim* quotations from the
7 original time sheets (Dkt. 607, at 8-9). The Court was aware of the precise content of
8 each entry. At most, the Zwerling and Finkelstein firms have provided new evidence
9 with an implicit request that the Court rely on their *ipse dixit* as to the “true” meaning
10 of their time sheets. This is not possible since the new interpretations were known to
11 them prior to the Court’s order. They have not cited to the record to support their
12 new interpretations, and they apparently expect the Court to ruffle through the time
13 sheets. However, “Judges are not like pigs, hunting for truffles buried in briefs,” nor
14 are they required to hunt for new interpretations buried in time sheets. *Entertainment*
15 *Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir.
16 1997) (quoting another case).

17 **III. McGuireWoods Raises the Same Arguments and Sources As Before and**
18 **Fails to Identify Any Material Facts That Were Disregarded By the Court.**
19

20 McGuireWoods has neither identified any material facts that the Court did not
21 consider nor explained how the Court disregarded any material facts. *See* Local Rule
22 7-18(c). The pending motion (Dkt. 632) must be denied because McGuireWoods
23 recites the same arguments and sources previously raised before this Court. Even if
24 McGuireWoods was entitled to fees, which it is not due to its ethical conflict, it failed
25 to meet its burden to show that the requested fees were reasonable. Dkt. 627, at 10
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27 _____
28 ²⁴ *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 564 (1986) (quoting *Blum v. Stevenson*,
465 U.S. 886 (1984)) (cited in *Galdamez v. Potter*, 2007 WL 845914, *1 (D. Or. March 15, 2007) (“Plaintiff carries the
burden of proving the lodestar”)).

1 (“McGuireWoods did not provide any published or legal sources to justify these rates
2 for each region of practice”).

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4 **CONCLUSION**

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6 For the reasons stated above, we respectfully request that the Court deny the
7 pending motions for reconsideration.

8 DATED: March 1, 2010

Respectfully submitted,

9
10 By:



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