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

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

14 Plaintiffs,

15 vs.

16 WEST PUBLISHING
CORPORATION, a Minnesota
17 Corporation d/b/a BAR/BRI, and
18 KAPLAN, INC., a Delaware
Corporation,

19 Defendants.
20

Case No. CV-05-3222 R (MCx)

OPPOSITION TO PLAINTIFFS'
MOTIONS FOR
RECONSIDERATION
(SCHNEIDER/HEAD OBJECTORS)

Date: August 9, 2010
Time: 10:00 a.m.
Courtroom: 8

Hon. Manuel L. Real

21 AND CONSOLIDATED ACTIONS
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1 **I. INTRODUCTION**

2 McGuire Woods LLP (“MW”) disagrees with this Court’s interpretation and
3 application of the opinion in *Rodriguez v. West Publishing Corp.*, 563 F. 3d 948 (9th
4 Cir. 2009); disagrees with the *Rodriguez* court’s reliance on *Image Tech. Serv., Inc. v.*
5 *Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998); and disagrees with the *Image Tech*
6 opinion. But disagreement with Ninth Circuit opinions, or this Court’s application of them,
7 is not an appropriate basis for filing a motion for reconsideration. Further, McGuire Woods’
8 argument consists entirely of re-argument of legal authorities and facts already presented to
9 this Court, both of which the Court has unquestionably evaluated in making its determination
10 on Class Counsel’s fees.

11 The joint motion for reconsideration filed by Finkelstein Thompson LLP (“FT”) and
12 Zwerling, Schachter & Zwerling, LLP (“ZSZ”) is equally improper. These firms concede that
13 the matters which form the basis of their motion for reconsideration “were before the court”
14 when it issued its fee order, but that this court failed to consider them. FT and ZSZ
15 Memorandum in Support of Motion for Reconsideration (Doc. No. 642) at 1-2. But a review
16 of the motion reveals that the real issue is that FT and ZSZ do not feel that this court was
17 justified in reducing their lodestar for the reasons given by the court or in declining to award
18 a multiplier. *Id.* at 5-8. These issues are not appropriate for review in a motion for
19 reconsideration – they are the very essence of appellate issues.

20 Nothing about this Court’s handling of class counsel’s fee request on remand suggests
21 a misapplication of or failure to consider any legal or factual issues. The Court’s fee ruling
22 unambiguously determined and foreclosed most of the very arguments made yet again in
23 these motions for reconsideration. The motions should be denied.

24 **II. ARGUMENT**

25 Under the Local Rules, the only possible applicable grounds for reconsideration of the
26 Court’s decisions on class counsel’s fees is Local Rule 7-18(c) “a manifest showing of a
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1 failure to consider material facts presented to the Court before such decision.”¹ As for
 2 McGuire Woods, there is no material fact that has gone unnoticed – the firm’s argument on
 3 reconsideration relies instead upon novel theories of compensation and reargument of cases
 4 already argued before this Court and the Ninth Circuit, in an attempt to wish away the
 5 conflict of interest and ethical violations that occurred in the case. Nor do the remaining
 6 firms indicate any failure to consider material facts in this Court’s decision to award them
 7 less than they requested. Instead, the record continues to be characterized by a dearth of facts
 8 supporting the fees they requested in the first place, so that the fees that those firms were
 9 actually awarded can only be viewed as generous under the circumstances.

10 **A. Equitable Considerations do not Permit McGuire Woods to be**
 11 **Compensated**

12 There is no case concerning concurrent conflict of interest that suggests that if fee
 13 recovery is prohibited a conflicted lawyer may simply recast the fee request as one addressed
 14 to equity.² The operation of law depriving McGuire Woods of its fee does not set up a
 15 consequent equitable action for unjust enrichment in McGuire Woods’ favor. On the
 16 contrary, California courts have rejected the argument that the deprivation of a lawyers’ fee
 17 under conflict of interest circumstances results in a disfavored “windfall” to the party
 18 excused from payment. *Goldstein v. Lees*, 46 Cal.App.3d 614, 623-24 (1975). In this case,
 19 the law defines the equities, and directs that, as between McGuire Woods and the Class, it is

20
 21 ¹ The other two grounds do not even arguably apply: “(a) a material difference in
 22 fact or law from that presented to the Court before such decision that in the exercise of
 23 reasonable diligence could not have been known to the party moving for reconsideration at
 24 the time of such decision, or (b) the emergence of new material facts or a change of law
 occurring after the time of such decision....”

25 ² This argument hews very close to that made by certain *pro se* lawyer/objectors
 26 in this case who have sought to convert their erstwhile fee request into a request for an
 27 “equitable award” on an unjust enrichment theory. McGuire Woods correctly opposed that
 28 silly argument (See Class Counsel’s Omnibus Opposition to Objectors’ Motions for Awards
 of Attorneys’ Fees and Expenses, Doc. No. 633 at pages 9-11), only to take up its close
 cousin in this motion for reconsideration.

1 the Class that should retain the money, and it is McGuire Woods that would be unjustly
2 enriched if it were paid any more than the law allows.

3 McGuire Woods' recurrent appeal to emotion – that the result here is simply too harsh
4 to impose on an otherwise well-meaning firm – carries no weight against the priority of the
5 protection of the consuming public and its perception of the integrity of our judicial system.
6 California cases make that clear. See, Cal. Prof. Cond. Rule 1-100; *Bruno v. Bell*, 91 Cal.
7 App. 3d 776 (1979). This result is not unusual where the rules involved are intended to
8 place paramount importance on the protection of the consuming public.³

9 Finally, the fact that some firms prosecuting class actions will on rare occasion be
10 deprived of a fee for a conflict of interest is not a condition that goes uncompensated in the
11 aggregate. There is a reason class litigation is called complex litigation. The ethical issues
12 involved in representing and adjudicating the substantive rights of thousands or even millions
13 of people can become very complicated, a condition compounded by the heightened scrutiny
14 afforded to conflict analysis in class actions. That is one reason why class action lawyers get
15 paid more in cases in which they manage to prevail without running aground: the “risk of
16 nonpayment” or the “risk of maintaining a class through trial” do not just arise from losses on
17 the merits, but from the potential risk that the class attorney will encounter a conflict of
18 interest requiring withdrawal or disqualification. Therefore, the potential loss of fees in
19 class actions for ethical violations is a risk that is compensated by multipliers in cases in
20 which those ethical violations do not occur.

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23 ³ For example, the California Supreme Court has rejected similar equitable
24 theories of recovery in the context of unlicensed contractors, who are prohibited from
25 collecting the reasonable value of labor and materials even if the work they performed was
26 adequate, and even if the customer was aware that the contractor was unlicensed. *MW*
27 *Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 36 Cal.4th 412, 423,
28 430 (2005) *Wright v. Issak*, 149 Cal. App. 4th 1116, 1119 (2007); *Opp v. St Paul Fire &*
Marine Ins. Co., 154 Cal.App.4th 71 (2007); *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 52
Cal.3d 988, 1000-1002 (1991). In that context, courts routinely hold that the protection of
the consuming public outweighs any injustice or inequity to the contractors involved.

1 **B. McGuire Woods’ Disagreement with this Court’s Application of *Rodriguez***
 2 **is Unavailing**

3 Local Rule 7-18 clearly directs that “No motion for reconsideration shall in any
 4 manner repeat any oral or written argument made in support of or in opposition to the
 5 original motion.” Yet McGuire Woods argues, again, that there is no *per se* rule requiring
 6 the denial of their fee for a concurrent conflict of interest, or that there must be a showing of
 7 “egregious harm” to justify the denial of the fee. McGuire Woods motion for reconsideration
 8 (Doc. No. 632) at 9. McGuire Woods has made this argument several times, most recently in
 9 the very fee application that this Court denied, and has cited the same cases yet again in
 10 support.⁴ The Head/Schneider Objectors have already distinguished each of those cases,
 11 twice. See Head/Schneider Opp. to Motion to Attorneys’ fees (Doc. No. 594) at 7-10 and fn.
 12 2 (noting that plaintiffs had already unsuccessfully argued these cases to the Ninth Circuit).
 13 In sum, the cases cited share one or more of the following distinguishing features: (1) they
 14 are not class actions, in which disqualification is more likely because the conflict of interest
 15 rule are applied more strictly, (2) they do not involve actual concurrent conflict of interest,
 16 and (3) there was arguably an effective waiver of the conflict. McGuire Woods’ argument
 17 that there must be an “egregious” breach of the rules to support the denial of its fee is both
 18 incorrect and irrelevant: under the facts of this case there *was* an egregious breach of the
 19 rules, as detailed in several places in the *Rodriguez* opinion. See *Rodriguez v. West*
 20 *Publishing Corp.*, 563 F. 3d at 961 and 968. And the Head/Schneider Objectors have
 21 already explained that McGuire Woods’ theory that the Ninth Circuit does not understand
 22 California law is not, in fact, supported by California law.

23 McGuire Woods is free to disagree with this Court’s interpretation of *Rodriguez*, with
 24 the *Rodriguez* court’s reliance on *Image Tech*, with *Image Tech* court’s interpretation of
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 27 ⁴ *Cal-Pak Delivery v. UPS*, 52 Cal.App.4th 1 (1997); *Mardirossian & Assoc. V.*
 28 *Ersoff*, 153 Cal.App.4th 257 (2007); *Pringle v. La Chapelle*, 73 Cal.App.4th 1000 (1999);
 Sullivan v. Dorsa, 128 Cal.App.4th 947 (2005).

1 California law, with this Court's interpretation of *Image Tech* and California law, and with
2 California courts' interpretation of California law. It is not free to disagree with any of those
3 things *in a motion for reconsideration*, however. *Pegasus Satellite Television, Inc. v.*
4 *DirecTV, Inc.*, 318 F Supp. 2d 968, 981 (C.D. Cal. 2004) (denying reconsideration motion
5 arguing that court improperly applied Ninth Circuit case: "Under L.R. 7-18, a motion for
6 reconsideration may not be made on the grounds that a party disagrees with the Court's
7 application of legal precedent.")

8 Even if it were able to raise these issues now, McGuire Woods' attempt to minimize
9 the enormity of the ethical breaches adds nothing new, and goes nowhere. The Ninth Circuit
10 did not find McGuire Woods' conflict of interest problem to be "harmless." McGuire Woods
11 Motion for Reconsideration (Doc. No. 632) at 9:17. Had it found the conflict of interest to
12 be harmless and/or of no consequence to the fee award, the Ninth Circuit would have upheld
13 the original fee award for harmless error, or gone on to analyze the other objections.
14 Instead, it sent the matter back for the express purpose of considering the effect of the
15 conflict on the fee award. *Rodriguez v. West Publishing Corp.*, 563 F. 3d at 968-69.
16 Similarly, the Ninth Circuit did not find McGuire Woods to be "adequate" counsel. McGuire
17 Woods Motion for Reconsideration at 9. Rather, it found that the class had been adequately
18 represented notwithstanding the conflict of interest and that this Court did not abuse its
19 discretion in finding the settlement to be adequate. *Rodriguez v. West Publishing Corp.*, 563
20 F. 3d at 961. But even if McGuire Woods' routine services were "adequate" in the common
21 sense of the word, the fact would not change this Court's application of the rules.

22 McGuire Woods' oft-repeated contention that it did not "conceal" the Amended
23 Incentive Agreement is as unavailing on reconsideration as it has been all along. McGuire
24 Woods Motion for Reconsideration (Doc. No. 632) at 9:4-5. Once again: the problem was
25 never that McGuire Woods intentionally concealed the agreement from the Court, but rather
26 that the firm *failed to disclose* to the Court the agreements and the conflicts they created at
27 the time of class certification. The duty was to disclose, not to refrain from concealing, as
28

1 the *Rodriguez* opinion makes clear in no fewer than four places.⁵ *Rodriguez v. West*
 2 *Publishing Corp.*, 563 F. 3d at 958 (observing that “Much of the appeal turns on the presence
 3 — and ***nondisclosure*** to the class — of the incentive agreements.”) (emphasis added); *id.* at
 4 959 (“The arrangement was ***not disclosed when it should have been*** and where it was plainly
 5 relevant, at the class certification stage.”) (emphasis added); see also *Id.* at 960 (faulting
 6 counsel for “***failing to disclose*** the incentive arrangements in connection with class
 7 certification”)(emphasis added). And, as the *Rodriquez* court finally held:

8 [T]he conflict of interest inhering in the incentive agreements did not just
 9 happen, nor was it a conflict that developed beyond the control or perception of
 10 class counsel. It was inserted into the retainer agreement. “ ‘The responsibility
 11 of class counsel to absent class members whose control over their attorneys is
 12 limited does not permit even the appearance of divided loyalties of counsel.’ ”
 13 *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir.1995) (quoting *Sullivan*
 14 *v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D.Cal.1978)). ***In***
 15 ***addition, class counsel’s fiduciary duty is to the class as a whole and it***
 16 ***includes reporting potential conflict issues. Neither the incentive agreements***
 17 ***nor the possibility of conflict was disclosed to the court so that it could take***
 18 ***steps to protect the interests of absentee class members.*** We think it
 19 appropriate for the district court to consider whether counsel could represent
 20 both the class representatives with whom there was an incentive agreement,
 21 and absentee class members, without affecting the entitlement to fees.

22 *Rodriguez v. West Publishing Corp.*, 563 F. 3d at 968 (emphasis added).
 23

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 25 ⁵ The fact that the Amended Incentive Agreement was disclosed to the
 26 defendants in the case is not relevant, and has been raised before. The defendants did not
 27 represent the class, and their counsel did not seek payment of their fees from the fund.
 28 Neither defendants nor their counsel had a fiduciary duty to the Class. It was incumbent
 upon Class Counsel, and not the defendants, to disclose the agreement to the Court, and it is
 undisputed that it was not done.

1 **C. The Arrangement Between MW and its Plaintiffs in this Case Was Never**
2 **“Arguably Permissible”**

3 Proffering an article from the Illinois Bar Journal, earlier cited by this Court, MW
4 suggests that the contingent incentive arrangement in this case was “arguably permissible”
5 when made, so that they should not be held to account for the conflict of interest it created.
6 But neither this Court nor the Illinois Bar Journal article suggested that the arrangement
7 reached in this case, or the resulting chaos, was ever arguably permissible. The arrangement
8 between MW and its plaintiffs in this case was a pileup of several violations of well-
9 established rules. Thus the case involved a concurrent conflict of interest created by MW’s
10 contractual obligation to seek a contingent incentive awards in a sum certain measured by the
11 class’ recovery. In this case in which the class representatives were attorneys, it amounted
12 to a contract to split fees between attorneys without disclosure to the class or the court (*Mark*
13 *v. Spencer*, 166 Cal. App. 4th 219 (2008)), where some of those attorneys were also class
14 representatives. It is a pertinent financial arrangement between the attorneys and class
15 representatives that was also undisclosed to the Court (*Sipper v. Capital One Bank*, 2002 WL
16 398769 (C.D. Cal. 2002) and *Apple v. Superior Court*, 126 Cal. App. 4th 1253 (2005)) by
17 which the class representatives would receive what amounts to legal fees for their
18 participation in the case.

19 In aggravation, the contractual incentive award MW was required to seek was to be
20 measured as a contingent percentage of the class’ recovery, rather than upon any of the
21 traditional bases for class member incentive awards, such as personal risk, expenses or
22 inconvenience. *Staton v. Boeing Co.*, 327 F. 3d 938 (9th Cir. 2003). No known authority has
23 ever held any of this to be arguably permissible, and of course both this Court and the Ninth
24 Circuit have found that it was not.

25 **D. The Rodriguez Court Was Not Concerned with “Confirmation” of**
26 **McGuire Woods’ “Efforts” in this Case**

27 McGuire Woods expends two pages listing its various duties and work in the case.
28 MW Motion for Reconsideration (Doc. No. 632) at 4-6. It does so under the pretext that the

1 Ninth Circuit was “seeking confirmation regarding the nature and extent of [the]
2 contributions by McGuire Woods, or more specific findings by this Court regarding the
3 nature and extent of McGuire Woods’ efforts on behalf of the Class. . .” *Id.* at 6.

4 Nothing in the *Rodriguez* opinion remotely suggests that the issue on remand was to
5 be the extent of McGuire Woods’ contributions or efforts in the case. Even if it had been,
6 making such a belated showing on a motion for reconsideration would be improper. To the
7 extent the opinion mentions the development of the record in relation to the conflict of
8 interest, it was the objectors who sought that more information, such as time records, be
9 produced to the Court. See Head/Schneider, Feldman and Juranek Objectors Proposal for
10 Addressing the Mandate of the U.S.C.A. 9th Circuit on Attorneys’ Fee Issues filed June 12,
11 2009 (Doc. No. 543); see also Head/Schneider Opp. to Motion to Attorneys’ fees (Doc. No.
12 594) at 11:6-9 and n.7 (same).

13 McGuire Woods made no effort to develop the record in connection with the ethical
14 issues. Instead, Class Counsel’s strategy in this case was to renew their fee application and
15 rely upon the same legal theories pressed on appeal, on the theory that this Court should
16 simply “reaffirm” its prior award. See Memorandum of Points and Authorities in Support of
17 Settling Class Plaintiffs’ Motion for Distribution of the Net Settlement Fund Upon the
18 Occurrence of the Effective Date and for Approval and Distribution of Attorneys’ Fees and
19 Expenses (Doc. No. 583) at pages 7-9. That was a losing strategy. The firm should not be
20 permitted to double back on reconsideration and adopt a new strategy, especially where the
21 new strategy is no more likely to extricate it from its predicament.

22 **E. McGuire Woods Recent “Continuing Service” Cannot Cure the Ethical**
23 **Violations That Caused the Denial of its Fees**

24 After the entry of this Court’s Order recognizing and establishing the conflict of
25 interest, McGuire Woods has no right to demand compensation for its continued work on this
26 case. The firm was aware of the conflict of interest issue at the time of final approval. It
27 nonetheless continued work through final approval, appeal and remand with the full and
28 increasing knowledge that this Court might eventually deny it fees because of the conflict of

1 interest. It gambled and lost. The attempt to convert this activity into an “extra credit”
2 example of fiduciary good faith rings very hollow.

3 At this point, McGuire Woods’ continuing service can better be described as
4 “precatory entrepreneurialism.” The firm has already filed an appeal from the order denying
5 it fees. If it succeeds, it hopes that some or all of its past, present and future work may
6 become compensable. That is not so much good faith as good business. It also confers no
7 benefit on the class and as such should not be compensated.⁶

8 Regardless, this attempt to make a virtue of necessity is unavailing even assuming the
9 best intentions. There is no case law to suggest that a lawyer’s continued service of a client
10 despite a conflict of interest, even if competent, somehow mitigates or counterbalances the
11 application of the rule denying fees for concurrent conflict of interest.

12 **F. Zwerling Schachter & Zwerling / Finkelstein Thompson**

13 There are many circumstances in this case that support the fee amounts that this Court
14 awarded to Zwerling Schachter & Swerling and Finkelstein Thompson. In the Order
15 awarding fees, this Court mentioned several reasons for making a downward adjustment in
16 lodestar and refusing to apply a multiplier in the order awarding the fee, including “excessive
17 fees and noncompensable work . . . work done to preserve the award of attorneys’ fees, work
18 done in connection with the *Park* litigation , and other work performed that conferred no
19 benefits on the Class.” Order at 7.

20 The circumstances amply support the Court’s decision. In finding that the fees
21 requested were excessive this Court undoubtedly considered the fact that the hourly rates of
22 the ZSZ and FT firms increased dramatically between the initial judgment and the latest fee
23 request, working as a retroactive increase in the lodestar for all hours billed by those firms.
24 See Head/Schneider Opp. to Motion to Attorneys’ fees (Doc. No. 594) at 12-13. And the
25

26
27 ⁶ On the contrary, Class Counsel’s premature appeals from the fee order only
28 resulted in several months’ unnecessary delay, given that this Court initially declined to hear
the pending motions for reconsideration once the appeals were filed.

1 total hours claimed to be expended by those firms increased markedly, as well. *Id.*
2 Thus, the ten-percent reduction that this Court has applied to the lodestar – when that lodestar
3 is composed of massive additional billing hours at radically increased hourly rates – hardly
4 results in a true reduction below a “reasonable” lodestar at all.

5 Indeed, the fees ultimately awarded to the ZSZ and FT firms actually *exceed* the
6 amount that either firm was awarded prior to the appeal. Thus ZSZ originally sought and
7 obtained a 1.75 multiplier on a lodestar of \$792,414.50, for a total of \$1,386,725.38. This
8 Court has now awarded it \$1,532,706.40—an increase of \$145,981 over its initial fee award.
9 Likewise, FT was originally awarded \$1,102,095.75, or 1.75 times its lodestar of \$629,769.
10 The Court has since awarded that firm \$1,597,560.84—an increase of \$495,465.09 over its
11 initial fee award.

12 Given that neither firm challenged its initial fee award for work prior to the appeal, it
13 appears that these firms intend to complain that the additional \$641,446.09 does not
14 adequately compensate them for their comparatively modest contributions on appeal.
15 Viewed in that light, the additional fees this court has now awarded represent ample
16 compensation under any theory. Certainly, there is no evidence suggesting under-
17 compensation given the facts before the Court.

18 Furthermore, the ZSZ and FT firms might be considered fortunate to be paid at all.
19 Although the *Rodriguez* court did not find that those firms had a disabling concurrent conflict
20 of interest, the firms were aware of the Amended Incentive Agreements and also did not
21 disclose them to this Court. Had they done so, a major issue in this litigation may have been
22 avoided. E.g., *Rodriguez*, 563 F. 3d at 959 (noting that, if the conflict had been timely
23 disclosed, this Court might have taken steps to contain or otherwise mitigate the effect of the
24 conflict); see also *id.* at 968 (“class counsel’s fiduciary duty is to the class as a whole and it
25 includes reporting potential conflict issues.”). District courts have in fact disqualified co-
26 class counsel for similar missteps. See *Sipper v. Capital One Bank*, 2002 WL 398769 (C.D.
27 Cal. 2002) at *4 (failure to discover and disclose conflicts of interest in a class action case is
28 enough reason to disqualify associate counsel, even though they are not directly involved in

1 the misconduct). Thus it is clear that ZSZ and FT only narrowly – and some might argue
2 miraculously – dodged a fate similar to that of McGuire Woods.

3 Though the settlement is adequate, the road to its ultimate approval was unnecessarily
4 tortuous and rocky. There is not much room for excessive pride on the part of any of the
5 class counsel involved, much less excessive fees. For ZSZ and FT, fees that are only ten
6 percent less than the claimed lodestar and which greatly exceed in absolute dollars the fees
7 originally awarded before appeal can only be considered to be very generous under all of the
8 circumstances, well-justified on the record, and certainly reasonable. Certainly, neither firm
9 has shown any cause to challenge the fee award by way of a motion for reconsideration.

10 **III. CONCLUSION**

11 This Court’s decision on Class Counsel’s attorneys’ fees was amply supported by
12 authority and well-informed by facts on the record. Reargument of the same authority and
13 facts is not the purpose of a motion for reconsideration. The Motions should therefore be
14 DENIED.

15
16 Dated: June 28, 2010

KENDRICK & NUTLEY

17
18 By: /s/C. Benjamin Nutley
19 C. Benjamin Nutley

20 Attorneys for Head/Schneider Objectors
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