

**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)

REPLY BRIEF OF APPELLANTS GEORGE SCHNEIDER *et al.*
(Appeal Nos. 07-56643 and 07-56833)

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I. INTRODUCTION

Plaintiffs-Appellees expend much effort disregarding or gainsaying the district court's findings on the conflicts of interest in this case. But there is ample evidence to support Judge Réal's conclusions about the conflicts of interest in this case. The issue actually presented is whether the district court erred in failing to extend that finding to the attorneys in the case and to withhold approval of the settlement for lack of adequate representation.

Here, the district court had an understandable desire to salvage a settlement put in jeopardy by a sudden maelstrom of infighting among the representatives and their lawyers, which was compounded by the existence and nature of the contingent Amended Incentive Agreements. But rather than substituting its own view that the settlement was nevertheless fair, the district court should have refused final approval and appointed additional unconflicted counsel and representatives to evaluate the options available to the class. That might result in the same settlement (but without the taint of inadequate representation), a different settlement, or the case going to trial. Whatever the result, it would serve justice and, perhaps even more critically, preserve the public perception that justice has been served in this case.

Plaintiffs-Appellees are likewise unable to explain why the conflicts the

district court found should not have severely affected the fee awarded in this case, and cannot explain the more mundane irregularities in the fee award, such as awarding a fee and multiplier for future work not yet accomplished.

Finally, Plaintiffs-Appellees fail to find any valid legal or factual support for the district court's decision to deny fees to the Head/Schneider Objectors' counsel.

II. ARGUMENT

A. The Conflicts of Interest Found by the District Court

Precluded Settlement Approval

Plaintiffs-Appellees make numerous arguments to explain away the conflicts of interest, breaches of professional rules, and failures of candor that the district court found in this case. Not one is correct on the facts presented in this case. Plaintiffs-Appellees say that the Incentive Agreements said that McGuire Woods would “*request*” court approval of incentive awards “in certain amounts,” creating no conflict Plaintiffs-Appellees’ Brief (“P-A Brief”) at 40 (emphasis in original).

Plaintiffs-Appellees miss the point entirely. Schneider did not argue, and the district court did not hold, that *any* agreement merely to request an incentive award creates an impermissible conflict. Schneider *did* argue – and

the district court agreed – that *this* agreement between class counsel and class representatives (who also happen to be lawyers), made at the outset of the case, to move for a contingent-based incentive award to be taken from the class fund, is ethically impermissible and against public policy, results in a conflict of interest and an appearance of impropriety, and that the failure to disclose such an agreement to the district court at the outset is a failure of candor to the court on the part of class counsel.

Evidently conscious of this, Plaintiffs-Appellees make the extreme argument that “a conflict of interest should arise only if an incentive award is actually *promised*.” P-A Brief at 44-45. But the journal article Plaintiffs-Appellants cite does not suggest that should be the *only* way a conflict of interest can arise from an incentive agreement, and says nothing about undisclosed agreements calling for the attorneys to request specific incentive awards for lawyer class representatives, measured by the recovery in the case.

Yet Plaintiffs-Appellees assert that the conflict and failure of candor cannot be ascribed to the class representatives or class counsel because of the novelty of the issues presented and because they did not operate in bad faith. P-A Brief at 53-54. Whatever the potential merits of this argument in the abstract, it does not apply to this case. Judge Real identified numerous

problems with the Incentive Agreements and the conduct surrounding them, across a broad spectrum of law and rules. Though these rules sometimes interact in complex ways in class actions, the cases and professional rules relied upon here are hardly new, and Judge Real's decision on this point was based upon well-established and well-understood rules of law discussed at some length in the Head/Schneider Objectors' Opening Brief ("H/S Opening Brief").

For the issues presented here the absence of bad faith is not a factor. H/S Opening Brief at 19-20. This was a case of dual representation, where the lawyers were bound – first by agreement and then by circumstance – to mediate between the conflicting interests among the class representatives and between the representatives and the class members. It has long been the case that this results in disqualification without regard to the bad faith of the attorneys. The intent is not to punish the attorneys, but to rectify the appearance of impropriety. In this case, where the case and settlement were subject to substantial national news coverage (P-A SER 1747-1753), that is even more critical.

1. Appellees’ Argument That the Incentive Agreements Presented Only a “Theoretical” Conflict of Interest That “Never Materialized” Is at Odds with the Relevant Authority and the Rulings of the District Court

As the Head/Schneider Objectors pointed out on opening, in the context of the ethical rules implicated here – and particularly as applied to class actions – there is no such thing as a “theoretical” conflict of interest that may simply be ignored if it does not “materialize.” In fact, the law is exactly to the contrary. See H/S Opening Brief at 20 (citing *Cal West Nurseries, Inc. v. Superior Court*, 129 Cal.App.4th 1170, 1175 (2005)). It is the appearance of impropriety, whether or not a conflict actually causes harm, that is determinative. See *Bruno v. Bell*, 91 Cal.App.3d 776 (1979). In *Bruno*, the court reversed an award of fees to an attorney who, as a *pro per* plaintiff representing the taxpayers of California, had successfully challenged a statute as unconstitutional. The court noted that it is “improper for an attorney to prosecute a fee-generating class action suit in which he himself was named as plaintiff.” *Bruno*, 91 Cal.App.3d at 788 citing *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d. Cir. 1976). The court concluded:

Without questioning Bruno’s integrity and assuming he acted out

of the highest motives, we must nonetheless be cognizant . . . that “on occasion, ethical conduct of a lawyer may appear to laymen to be unethical.”

We conclude that the appearance of impropriety in this case far outweighs the benefits of rewarding an attorney for his diligence in successfully challenging an unconstitutional statute. The attorney’s fee award was therefore void as against sound public policy.

Bruno, 91 Cal.App.3d at 788.

Moreover, the district court itself expressly rejected the argument Plaintiffs-Appellees raise in favor of the theory that the incentive award provisions did not present an actual conflict of interest, and did not influence the class representatives’ evaluation of the settlement:

The conflict of interests here was not simply potential. Indeed, in this case there was an actual manifestation of conflicting interest. The Objecting Plaintiffs claim that Class Counsel threatened to not request incentive payments on their behalf pursuant to the Incentive Agreement if they did not agree to the Settlement. . . .Although the Objecting Plaintiffs argue that there is no actual conflict of interests because they continue to object to the Settlement, the Objecting Plaintiffs have never taken a position that jeopardizes their \$75,000 incentive award request because they do not object to the settlement with Kaplan. The \$13 million settlement with Kaplan alone exceeds the \$10 million provision in the Incentive Agreement which contractually requires Class Counsel to request a \$75,000 incentive payment on their behalf.

ER No. 4; p. 68: 7-12.¹

Those manifestations of “actual conflict” in this case are more than sufficient to support Judge Real’s express finding that the conflict was not merely theoretical, even if that were a dispositive issue.

The cases Plaintiffs-Appellees cite are not to the contrary. In *Cummings v. Connel*, 316 F.3d 886, 896 (9th Cir. 2003) the trial court found that *speculative* conflict would not support finding of inadequacy of representation, and noted that it was “willing to reconsider and decertify the class if . . . there was evidence of an actual conflict.” *Id.* at 896. Here, as Judge Real found, there was an actual conflict of interest that had persisted before class certification and settlement, but which was not brought to his attention until much later. This case therefore presents the opposite situation from that in *Cummings*, in which the court was in a position to deal with any potential conflict before the fact.²

¹ Here, class counsel did in fact make a motion for the incentive awards as required by the Amended Incentive Agreements, arguing in favor of between \$25,000 and \$75,000 for the various representative plaintiffs. P-A SER 1456 *et seq.*

² *Jaffe v. Morgan Stanley & Co., Inc.*, 2008 WL 346417 at *6 (N.D. Cal. 2008) is also distinguishable. In *Jaffe* the district court became aware of a potential conflict prior to the preliminary approval of the settlement, but the named plaintiff took steps to eliminate the conflict, ultimately leading

In this case, by contrast, the district court expressly found that the Class Representatives interests were *not* aligned with the class, exactly the type of “serious and irreconcilable” conflict referred to in *Mateo v. M/S Kiso*, 805 F.Supp. 761, 772 (N.D. Cal. 1991), also cited by Plaintiffs-Appellees, and a condition that prevented a finding of adequacy of representation.

**2. The District Court Properly Found a Conflict of Interest
as to All of the Class Representatives**

Plaintiffs-Appellees postulate that there were two “non-conflicted” class representatives who did not sign the Incentive Agreements, represented by Zwerling, Schachter and Zwerling, LLP (the so-called “ZSZ plaintiffs”). That is directly contrary to the rulings of the district court, which did not find that the two ZSZ plaintiffs were “non-conflicted.” On the contrary, Judge Real denied incentive awards to *all seven* named plaintiffs on the express finding that it was necessary to remedy the conflicts of interest in the case. ER 68, lines 13-16.

That holding is squarely line with the *Sipper* case discussed in Judge

the court to rule that her interests were aligned with the class and that she was an adequate representative.

Real's opinion. ER 67, lines 16-22.³ In *Sipper*, there were also two assertedly "untainted" plaintiffs, who were represented by co-counsel not a party to the conflict. But the district court also disqualified co-counsel and the plaintiffs, even though (or arguably, because) they were unaware of the conflict, in part because they failed to detect the conflict and then failed to recognize its seriousness on briefing it. *Id.* at *4.

There is in fact ample evidence to support Judge Real's decision on this point. ZSZ attorneys should have known about the Incentive Agreement in March of 2006, if not before, because it was discussed at a deposition defended by a ZSZ attorney. See P-A SER 270 (March 17, 2006 deposition transcript in which Mr. Drachler, an ZSZ attorney, is defending the deposition of Reena Frailich as she discusses the Amended Incentive Agreement). Even the defendants were aware of the Agreement by April 18, 2006, prior to class certification, making it difficult to believe that all plaintiffs counsel were not aware of it. See Opinion and Order, ER 67, lines 15-16. See also P-A SER 263 Declaration of Sydney K. Kanazawa dated June 26, 2007, at ¶10 ("The actual Retainer Agreements were produced to Defendants on April 18, 2006,

³ *Sipper v. Capital One Bank*, 2002 WL 398768; 2002 U.S. Dist. LEXIS 3881 (C.D. Cal. 2002).

before Class Certification.”).

ZSZ attorneys, and presumably their clients, were certainly aware of the Agreement by February and March of 2007, when the incentive awards were negotiated with defendants in the context of the settlement, and it became clear that the objecting plaintiffs were intent upon requesting the full contractual amount of \$75,000. Two of the signatory plaintiffs declared that they were contacted by ZSZ attorney Dan Drachler,⁴ who spoke to them about the Incentive Agreement, and asked them to reduce their incentive award demands to \$25,000 each. P-A SER 1731 at ¶11 (declaration of plaintiff Nesci); P-A SER 1735 at ¶7 (declaration of plaintiff Rodriguez). From the facts that unfolded, the inference is unavoidable that the ZSZ plaintiffs were to incidentally benefit by the selection of \$25,000 – the lowest amount provided by the Incentive Agreements – as the “compromise” amount urged upon the signatory plaintiffs by class counsel.

Thus, the failures of candor and conflicts of interest were equally applicable to ZSZ and “their” representative plaintiffs. Judge Real’s error was not in so finding, but in failing to take the additional steps necessary upon so finding.

⁴ See P-A SER 1293 (Dan Drachler entry in ZSZ firm resume).

**3. The District Court Did Not Properly “Remedy” the
Conflicts of Interest Simply by Denying the Incentive
Awards**

Plaintiffs-Appellees conclude that the district court “exercised its discretion to ameliorate whatever conflict it saw by denying all incentive awards, thereby ensuring that the Class would not suffer any material detriment.” P-A Brief at 42. This formulation, of course, begs the very question whether the district court was within its discretion to deal with the conflict it found merely by denying incentive awards to the class representatives.

In any event, merely denying the incentive awards did not “ensure” that the class suffered no detriment. Although it saved the class fund from paying the incentive awards, it did not cure the central problems identified by Judge Real: If the conflicts of interest *had* affected the ultimate settlement value and the representative plaintiffs’ incentives in agreeing to it, merely taking away the incentive awards would not cure that. Nor would denying incentive awards cure the public perception that the conflicts of interest might have affected the settlement.

Again, the proper remedy was to refuse final approval and appoint

additional, unconflicted counsel who could ascertain and opine to the district court whether the settlement was, in fact, fair, adequate and reasonable under the circumstances. Finally, as discussed *infra*, Judge Real's failure to hold class counsel equally accountable for the conflicts of interest will mean that the class suffers the additional detriment of paying more than it should for attorneys' fees in this case.

4. Appellees Cannot Explain Away the Additional Intra-Class Conflicts Unrecognized by the District Court

Defendants-Appellees and Plaintiffs-Appellees both argue in support of the settlement approval that the Clayton Act Section 7 case is without merit, so that there is no conflict inherent in Plaintiffs decision not to afford compensation to the subset of class members with those claims.

One expects defendants to so argue. Yet plaintiffs maintained the Section 7 case in the pleadings throughout the case. See P-A SER 2192-93 (First Amended Complaint dated May 26, 2005, in which Plaintiffs' first cause of action for violation of Section 7 of the Clayton Act). They suddenly changed their minds upon settling the case, asserting without qualification that the claims were without merit. See P-A SER 396-400 (in Reply to Plaintiffs Ryan Rodriguez [et al.] Objection to Preliminarily Approved Settlement [etc.],

dated June 11, 2007). Plaintiffs told the district court that they “Would Not Prevail” and “cannot prevail” on the Clayton Act claim. P-A SER 396. They stated flatly that the claim “Is Time Barred” and “would...be dismissed as time barred.” *Id.* They even claimed that the challenged arrangement “was pro-competitive” and “benefited consumers.” P-A SER 397. In a later filing, plaintiffs stated that class members from 1997 through 2001 “would recover nothing, even in the event of a total victory,” because “tolling provisions are not available” so that claims under the Clayton Act “are time barred.” P-A SER 879 (in Settling Plaintiffs’ Reply Memorandum in Support of Final Approval).

Yet Plaintiffs concurrently admitted that the existence of the claim creates a split in the class, and implicitly, a conflict: “Application of the four-year statute of limitations and/or the doctrine of laches, possibly defeating or diminishing the claim all together *and certainly dividing the Class as currently defined.*” *Id.* (emphasis added). But it is not the risk of losing the Clayton Act claim on the merits that would have divided the class – that would be moot if the claim were lost. In fact, the division in the class was caused by the possibility that the claim would succeed, a matter never resolved on the merits.

The settlement therefore represents not compromise on this issue, but a complete capitulation to the defendants' arguments. Is it because the class representatives were finally and inalterably convinced of the propriety of defendants' arguments, after fully litigating the issue? Apparently not: according to the Defendants-Appellees, the Section 7 claims were not "a focus of the Class during discovery." Defendants-Appellees Brief at 14 (point heading) and 16 (text) ("[T]he Class devoted little attention during discovery" to the claims).

Plaintiffs-Appellants arguments that the claim "cannot prevail" should not carry the day. They must acknowledge a division among class members – those who have additional Clayton Act claims, and those who do not – which is not reflected in the Settlement's damages allocation and which is a prima facie indication of a conflict among class members. See H/S Opening Brief at 26.

5. Having Found the Conflict, the District Court Could Not Approve the Settlement on the Theory That its Perceived Adequacy Constituted Adequate Representation by Lead Plaintiffs and Their Counsel

Plaintiffs-Appellees argue essentially that a court may ignore conflicts of interest, failures of candor, and consequent inadequate representation so long

as it believes the settlement itself to be fair, adequate, and reasonable. But Plaintiffs-Appellees grossly misstate current Ninth Circuit law on the issue of the consequences of conflicts of interest and a finding of inadequacy.

Questions of Plaintiffs' adequacy are antecedent to issues of a settlement's fairness. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 621 (1997). In *Amchem*, the Supreme Court explicitly held that, unless the criteria for certification of a settlement class were met, a judge could not even proceed to consider a settlement's merits:

[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Id.

The adequacy of the lead plaintiff is paramount among those protective standards referred to in *Amchem*. The very point of the adequacy inquiry under Rule 23 is to “uncover conflicts of interest between the named parties and the class they seek to represent.” *Id.* at 625. Once uncovered, those conflicts must result in rejection of any settlement that is the product of such disloyal representation.

As if in apparent ignorance of the *Amchem* precedent, the Plaintiff-

Appellees argue in their Brief that “proof of adequate representation is in the adequacy of the settlements,” citing to *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992). That is precisely the proposition that was squarely rejected by *Amchem*. While this may have been an accurate statement of the law in the Ninth Circuit and some other jurisdictions in 1992, when *Class Plaintiffs* was decided, it is assuredly not the law of the Ninth Circuit or the United States today. *Class Plaintiffs* was clearly overruled by *Amchem*.

Plaintiffs-Appellees contention that the Appellants “have pointed to no convincing indications of inadequacy in the Settlement terms” is immaterial and erroneous, as it is based upon a discredited and overruled methodology of evaluating lead plaintiffs’ adequacy by examining the product of their representation. Instead, *Amchem* and its progeny clearly require the presumption that any settlement that results from disloyal and conflicted representation is per se unfair and unreasonable.

Judge Real therefore got it backwards. He approved the settlement, but then proceeded in essence to find each of the Lead Plaintiffs inadequate in the context of the motions for incentive awards, nevertheless concluding that “the conflict of interest between the Class Representatives and the Class Members does not disturb the Court’s finding that the Settlement is fair, adequate and

reasonable.” ER 43. Instead, the analysis of Lead Plaintiff’s adequacy should have occurred *before* the Court ever reached the issue of the settlement’s fairness and adequacy on the merits. Given the district court’s findings that each of the representative plaintiffs suffered from a disqualifying conflict of interest, the court was precluded from consideration of the settlement. Therefore, far from “curing” any finding of inadequacy, the settlement that resulted from the conflicted representation must be excluded entirely from the Court’s consideration.

The more recent cases Plaintiffs-Appellees cite are not to the contrary, and *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234 (9th Cir. 1998) is actually instructive as to how Judge Real might have proceeded. Faced with conflicted class counsel, the district court in *Linney* appointed *new* counsel – two firms previously unconnected to the case – who conducted an independent review and analysis of the proposed settlement, including conducting their own discovery. *Id.* at 1238. Afterwards, the new counsel reached a more favorable settlement. *Id.*⁵

⁵ That the *Linney* court permitted initial counsel to remain in an advisory capacity for the sake of efficiency is unremarkable. The Head/Schneider Objectors never argued that all of the counsel in the case should be banished entirely, never to be heard from again, but rather that the district court should have disqualified them as adequate representative counsel.

None of that happened in this case. Indeed, *Linney* supports the theory that appointing new, unconflicted counsel to review the litigation and proposed settlement not only will preserve the appearance of propriety, but might well also result in a better settlement for the class.⁶ In fact, the course adopted in *Linney* is *exactly what the Head/Schneider Objectors have requested that this Court order on remand*. See H/S Opening Brief at 40.

White v. National Football League, 822 F.Supp. 1839, 1406-7 (D. Minn. 1993) does not support Plaintiffs-Appellees either. In *White*, the district court expressly found that “the interests of the named plaintiffs are neither antagonistic nor adverse to the interests of absent class members, and that the preferential treatment of the named plaintiffs is not excessive, but fair and reasonable under such circumstances.” Again, the district court in this case found just the opposite, rendering *White* unhelpful.

B. The Fee Award to Class Counsel Cannot be Upheld

Plaintiffs-Appellee’s argument that the trial court did not abuse its discretion in refusing to disallow or reduce the attorneys’ fees as a result of the conflicts of interest in this case raised by class counsel’s agreeing to the

⁶ The result in *Linney* is exactly the course that the Head/Schneider Objectors have requested that this Court order on remand. See H/S Opening Brief at 40.

Amended Incentive Agreement is not supported by the factual posture of this case, or the law.

First, none of the authorities relied on by Respondents involves a class action and the complex conflict issues presented by them. This leads them well astray. For example, Plaintiffs-Appellants rely on two cases involving waiver or consent to a conflict.⁷ But cases turning on a waiver of conflict by the client are inapposite to class action cases because absent class members cannot give consent to or waive conflicts of interest. See H/S Opening Brief at 21, citing *Apple Computer v. Superior Court*, 126 Cal.App.4th 1253, 1274 n.7 (2005).

Sullivan v. Dorsa, 128 Cal.App.4th 947 (2005) is likewise far afield.

The case involved a partition action in which the issue was whether fees incurred by lawyers hired by the partition referee deciding the case should be

⁷ In *Pringle v. LaChapelle*, 73 Cal. App. 4th 1000 (1999), the appellate court upheld an award of attorneys' fees after a jury trial in which the jury, in a special verdict, found that ***the client had given written consent*** to allow the attorney to represent more than one client where the interests of the clients actually conflicted. *Pringle*, 73 Cal.App.4th at 1003. Similarly, in *Mardirossian v. Ersoff*, 153 Cal. App. 4th 257, 278 (2007), the court found that a ***written consent*** informing the appellant that a conflict might exist (coupled with the fact that the appellant acknowledged the opportunity to consult with outside counsel concerning the issue) was sufficient to comply with Rule 3-310 of the California Rules of Professional Responsibility.

disallowed after a conflict of interest had arisen by virtue of the law firm's pre-existing relationship with the prospective purchaser of the property. *Id.* at 964. But the court was not willing to find that the referee's attorneys owed the same duties to the owners of the property as to the referee and, in any event, the property owners made no showing that they ever became clients of the attorneys. *Id.* at 964-65. Here, by contrast, there is no question that the class members are clients to whom class counsel and the class representatives owed the highest duties of loyalty.

Quite apart from the conflict of interest, this is a case in which the district court ruled that:

It is disingenuous, improper, and a violation of the Federal Rules, for class counsel to request and argue for an arbitrary, contractually-obligated incentive award that is not reflective of the factors courts consider in granting such requests.

ER 59, citing FRCP Rule 11. Nevertheless the court awarded these same counsel a 1.75 multiplier on all of the time spent – and to be spent – in the case, up to the 25 percent of the fund they had originally requested. Plaintiffs-Appellees cannot and do not explain the incongruity between these underlying findings and a relatively rich award of fees out of the class fund.

Finally, Plaintiffs-Appellees' attempt to limit the rationale of *Clark v. City of Los Angeles*, 803 F. 2d. 987 (9th Cir, 1986) to fee-petition work only is

disingenuous. P-A Brief at 59, note 16. Appellants cited the case for the proposition that post-settlement work is generally not accorded a multiplier and that the award of a multiplier for work not yet done in this case was an abuse of discretion. H/S Opening Brief at 30-31. The actual holding in *Clark* on which Appellants rely is as follows:

Once plaintiffs' attorney arrived at the fee-petition stage, he represented the prevailing parties. Although some risk and delay still existed, both of these hazards were greatly diminished by the time the hearing was held. Accordingly, the factors that justified an upward adjustment for fees associated with the trial were generally absent or at least greatly reduced for litigation of the fee petition. Of course, other factors that justify an upward adjustment may be present in fee-petition litigation. (Citation omitted). But nothing in this record indicates that any of these factors are present here. Use of the multiplier to increase the fees for fee-petition work was an abuse of discretion.

Clark 803 F. 2d at 992. Though the court's holding in the case applies to work on a fee petition, the rationale of the court clearly applies to all post-trial or post-settlement phases of a case, where the risk is "greatly diminished." The term "fee petition" in the court's discussion could be replaced with "appeal" or "settlement administration," and the court's observations would be just as relevant.

C. The Denial of Fees to the Head/Schneider Objectors was an Abuse of Discretion

As the Head/Schneider Objectors pointed out on opening, Judge Real evidently misconceived the standard for awarding attorneys' fees to objectors: that authority countenances fee awards not just for conferring a financial benefit on the class, but also in cases in which counsel *materially contribute to a proceeding by providing the benefits of adversarial analysis*. See H/S Opening Brief at 32-33 & nn. 5 & 6 (discussing fee reimbursement for providing the benefits of adversarial analysis that assists a court in evaluating a settlement or fee request in a class action).

Nevertheless, Plaintiffs-Appellees assert that the district court “specifically found that the Objectors did not substantially enhance the benefits to the class.” P-A Brief at 62, citing P-A SER 97-98.⁸ That formulation is not only an unduly restricted interpretation of the legal standards applicable here, it is simply incorrect – Judge Real’s order does not say that. Instead, it says that objectors “did not add anything to the Court’s order denying the incentive awards.” See *Id.*

⁸ The cited order does not apply to the Head/Schneider Objectors, but to the Seigel Objectors. However, the same Order relating to Head/Schneider is identical in its phraseology. See ER 137-38.

Plaintiffs-Appellants do not submit any fact that supports the ruling that Judge Real actually made, however. In this case, an unbroken chain of facts demonstrates that the Head/Schneider Objectors met both of those criteria: they provided adversarial analysis that transformed the final approval proceeding on the issue of adequacy of representation, and they provided the central arguments that the district court relied upon in denying the incentive awards.

Suggesting that the Head/Schneider Objectors did not contribute to the elimination of the incentive awards, Plaintiffs-Appellants conspicuously ignore the facts that showed that the Court's perception of the conflicts of interest presented by the Incentive Agreements and the consequent denial of the incentive awards to the named plaintiffs was substantially a result of the work of the Head/Schneider Objectors' counsel. Plaintiffs-Appellants are resoundingly silent on the fact that *the district court here obviously excerpted several important rulings in its Opinion and Order directly from the Head/Schneider brief*. H/S Opening Brief at 33-36. That uncontroverted evidence eradicates all support for the proposition that Head/Schneider's counsel "did not add anything" to the proceeding or to the order denying the incentive awards.

Plaintiffs-Appellants also apparently do not dispute, for example, that

Judge Real was unaware of the incentive agreements and their implications before the final approval hearing, and that the first mention of the conflicts of interest inherent in the Amended incentive Agreements was at the final approval hearing, by Head/Schneider's counsel. See P-A SER 1021, lines 22-24, opening comments of Mr. Nutley ("The truth of it was these incentive awards were evidently built into an agreement at the inception of the case. They are percentage based.")⁹

Plaintiffs-Appellants do not dispute that Judge Real first took cognizance of the Incentive Agreements and their potential implications soon thereafter, in the same hearing and, upon gaining confirmation of their existence by class counsel, suggested he had not been aware of them:

THE COURT: My understanding is there were contracts made before with these –

MR. KANAZAWA: There was a –

⁹ Head/Schneider's counsel continued, describing the implications of a contingent, percentage-based incentive award agreement: "[W]here you have a class representative who is an attorney who has signed essentially what amounts to a contingent recovery agreement...you have a class representative who has a conflict of interest." P-A SER 1022, lines 12-20. He also discussed the fact that the conflict resulted in a disincentive to proceed to trial, given the \$10 million threshold in the Incentive Agreement and the consequent risk to the representative plaintiffs' contingent incentive awards. P-A SER 1026-27.

THE COURT: – with all of them.

MR. KANAZAWA: Yeah.

P-A SER 1041, line 22 through P-A SER 1042, line1. [whereupon Mr. Kanazawa described the Incentive Agreements and the various incentive award requests made pursuant to them]

THE COURT: I would like to see your contracts.

MR. KANAZAWA: They are submitted with the papers, Your Honor.

THE COURT: I haven't seen them. I have got a lot of papers.

P-A SER 1042, lines 13-17.¹⁰

This interchange represents the first instance, in the entire record in this case, in which Judge Real addressed the existence of the Incentive Agreements. The effect of that on the proceedings that followed cannot be understated, and Plaintiffs-Appellants do not appear to dispute that, either. Having been informed of the Incentive Agreements and their implications, Judge Real apprehended the problem quickly and began to question the appearing class

¹⁰ Actually, the Incentive Agreements were apparently first filed with the district court by the Objecting Plaintiffs in their opposition to Preliminary Approval. P-A SER 1754-57. However, no argument was made there that they presented a conflict of interest and Judge Real made no comment upon them.

representatives and attorneys about the conflict of interest problems inherent in a contingent incentive agreement. P-A SER 1077 (colloquy with Ms. Nesci); P-A SER 1095 (colloquy with Mr. Disner).

After the lunch break (commencing at P-A SER 1112), Judge Real's questions were clearly informed by having read the Incentive Agreements – he was obviously aware of their terms, and even more troubled by their implications. See P-A SER 1121, lines 14-18 (colloquy with Mr. Werlin):

THE COURT: The gradations – and there comes a percentage. It bothers me very much.

MR. WERLIN: Your honor, I'm going to let my colleague speak to that because –

THE COURT: Conflict of interest.

See also P-A SER 1126-1127 (musing that lawyer class representatives with a percentage-based incentive agreement tied to the recovery effectively become co-counsel).

At the conclusion of that hearing, Judge Real ordered further briefing on the issue of conflict of interest, but he also asked for “lodestar”-type information from the class representatives, indicating that he had not yet

decided how to proceed on the incentive awards. P-A SER 1145.¹¹

Head/Schneider counsel responded to the subsequent filing with their Supplemental Brief. And, as already set forth in detail in Head/Schneider's opening brief, many of the arguments, cases, and in some cases passages of text, from that brief ended up being used in Judge Real's Opinion and Order. Indeed, they clearly formed the primary basis for the denial of the incentive awards. See ER 58-68; *compare* ER 170-182 (H/S Objectors' Supplemental Brief) .

Far from denying it, Plaintiffs-Appellants admit this by pointing out elsewhere that the denial of the incentive awards was Judge Real's attempt to remedy the conflicts of interest identified by Head/Schneider Objectors. See P-A Brief at 42 (“[t]he District Court exercised its discretion to ameliorate whatever conflict it saw by denying all incentive awards, thereby ensuring that the Class would not suffer any material detriment.”)

Faced with the obvious conclusion that the denial of the incentive

¹¹ This eliminates the potential argument that Judge Real had already decided not to award the incentive payments prior to final approval. In any case, as pointed out on opening, two courts have found that it is an abuse of discretion for a court to deny attorneys' fees to objectors on the basis of an undisclosed conviction on the part of the district court, which happens to coincide with arguments made by objectors. Head/Schneider Brief at 37-38. However, Plaintiffs-Appellants do not appear to make this argument.

awards was the work of the Head/Schneider Objectors, Plaintiffs'-Appellees imply that the Head/Schneider Objectors sought "millions" of dollars in fees, far exceeding the financial benefit to the class by the objection. P-A Brief at 63. In fact, the Head/Schneider Objectors sought approximately one-third of the \$325,000 financial benefit brought to the class by the denial of the incentive awards, a request that was also tied to counsel's lodestar. The "millions" figure is apparently based on fee requests made by *other objectors*.¹²

Plaintiffs-Appellees make essentially no attempt at all to controvert, by reference to any other facts, the charge that Judge Real was simply mistaken. The record in this case compels the conclusion that, contrary to Judge Real's order on the request for fees, he was first made aware of the Incentive Agreements and their implications by Head/Schneider's counsel, and thereafter made their arguments a large part of his Opinion and Order approving the settlement. The result was just the sort of adversarial context that had a material effect on the proceedings and the issue of adequacy of representation,

¹² For example, several other objectors made a joint request for fees seeking a fee award of \$612,500, based upon an asserted entitlement to a percentage of the fee awarded to plaintiffs' counsel. P-A SER 162. The Head/Schneider Objectors have not challenged the district court's denial of fees to those other objectors, and the fact that other objectors made fee demands far in excess of the Head/Schneider Objectors is irrelevant to the merits of their fee request.

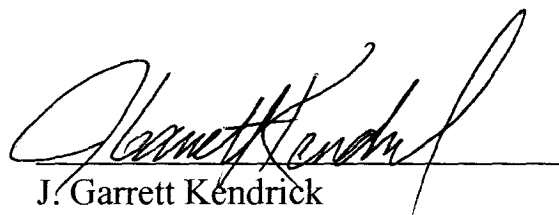
quite apart from the fact that Judge Real clearly relied upon their argument and briefing in the part of his Opinion and Order denying the incentive awards.

There can be no doubt in this case that Judge Real's holding that the Head/Schneider Objectors "did not add" to his order was founded in an incorrect view of the law, and a factual view of the record amounting to clear error, resulting in a holding that was an abuse of discretion.

III. CONCLUSION

The arguments made by Appellees here do not overcome the strong showing that the district court here erred in failing to extend its findings of conflict and inadequate representation, and in failing to recognize other disabling conflicts. Nor do those arguments support the attorneys' fees awarded to counsel under the circumstances, or the denial of fees to the Head/Schneider objectors. The Head/Schneider objectors therefore reiterate their request that the matter be resolved by reversal and remand in the manner as set forth in their Opening Brief.

Respectfully Submitted,



J. Garrett Kendrick

on behalf of Appellants Head, et al. and Schneider, et al.

CERTIFICATION OF COMPLIANCE PURSUANT TO

FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

FOR CASE NOS. Nos. 07-56643; 07-56645; 07-56646; 07-56647;

07-56649; 07-56650; 07-56651; and 07-56833

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I
certify that the attached brief is proportionately spaced, has a typeface of 14
points and contains 6,217 words.

Dated: June 16, 2008

By: 

CERTIFICATE OF SERVICE

I, J. Garrett Kendrick, declare that I am not a party to the action, am over 18 years of age and my business address is 1055 E. Colorado Blvd., Fifth Floor, Pasadena, CA. On June 16, 2008 I served the following document(s):

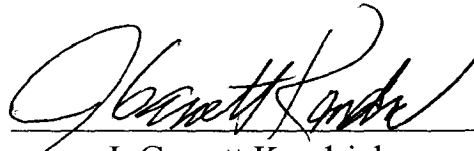
REPLY BRIEF OF APPELLANTS GEORGE SCHNEIDER, *et al.*

by making true and correct copies and depositing them with the U.S. Postal Service, postage prepaid on June 16, 2008 and addressed to the following:

SEE ATTACHED LIST

BY EMAIL: By transmitting them by email to the addresses on the attached Service List on June 16, 2008. The email address of the sender was jgk@private-ag.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 16, 2008 at Los Angeles, California.



J. Garrett Kendrick

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