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FILED
CLERK, U.S. DISTRICT COURT
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CENTRAL DISTRICT OF CALIFORNIA
BY *W* DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORIGINAL

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
CORPORATION, a Minnesota
Corporation d/b/a BAR/BRI, and
KAPLAN, Inc., a Delaware
Corporation,

Defendants.

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

~~PROPOSED~~ FINDINGS OF
FACT AND CONCLUSIONS
OF LAW

AND CONSOLIDATED ACTION

433

1 Representative Plaintiffs¹ and Defendants have submitted for approval a
2 Settlement of this Action that is memorialized in the Settlement Agreement. For the
3 reasons set forth below, the Court has determined that the Settlement is fair, reasonable
4 and adequate, and should therefore be approved. As the Court is contemporaneously
5 issuing a Judgment and an Order Approving Settlement, the Court makes the following
6 findings of fact and conclusions of law:

7 **I.BACKGROUND**

8 **A. Materials Considered by the Court**

9 1. In coming to its decision, this Court has considered the written
10 memoranda and other material submitted by the Settling Parties, as well as those
11 submitted by objectors to the Settlement (the "Objectors"). In addition, this Court
12 has relied upon its familiarity with this case resulting from motion hearings and the
13 documents submitted in connection therewith, and its general case management
14 duties. As discussed below, Class Counsel and counsel for Defendants have fully
15 briefed the request for approval, and they have supported the request with
16 declarations of fact. Class Counsel and counsel for Defendants were present at the
17 June 18 and July 9, 2007 Final Settlement Hearing and addressed issues that were
18 raised at the time by the Court and the Objectors.

19 **B. History of the Litigation**

20 2. After an extensive pre-filing factual investigation, plaintiffs
21 Ryan Rodriguez ("Rodriguez") and Reena B. Frailich (the "Initial Plaintiffs") filed
22 the first complaint in this Action in April 2005 against Defendants alleging claims
23 for violation of the federal antitrust laws (the "Initial Complaint").

24 3. The Initial Plaintiffs later filed a First Amended Complaint
25

26 ¹ Unless otherwise specifically defined herein, the capitalized terms in the Findings
27 of Fact and Conclusions of Law have the same meaning as attributed to them in the
28 Stipulation and Settlement Agreement, dated February 2, 2007 (the "Settlement
Agreement").

1 (“FAC”), in which plaintiffs Jennifer Brazeal, Loredana Nesci (“Nesci”) and Lisa
 2 Gintz (“Gintz”) joined.

3 4. Plaintiffs Kari Brewer and Lorraine Rimson filed a related action
 4 against Defendants in this Court entitled, *Brewer v. West Publishing Corp.*, Case
 5 No. CV-05-06211. The Court consolidated the two actions after motion practice on
 6 October 17, 2005.

7 **C. Plaintiffs’ Allegations**

8 5. The FAC, the operative complaint which seeks monetary
 9 damages and injunctive relief, alleges claims for violation of Sections 1 and 2 of the
 10 Sherman Act, and violation of Section 7 of the Clayton Act.

11 **D. Defendants’ Response**

12 6. Defendants answered the FAC in July 2006, raising numerous
 13 defenses, including statute of limitations, laches, proximate cause, standing, and
 14 *bona fide* business competition.

15 **E. Discovery**

16 7. The Action entered the discovery phase in August 2005.
 17 Plaintiffs took substantial factual and expert discovery relating to liability, damages
 18 and class certification issues.

19 8. Plaintiffs reviewed and analyzed over 400,000 pages of
 20 documents produced by Defendants and third parties, conducted one deposition
 21 pursuant to Fed. R. Civ. Proc. Section 30(b)(6), and deposed fourteen fact witnesses
 22 as follows:

23

Date	Deponent	Description of Deponent
07/14/06	Trent Anderson	Former employee of Kaplan
02/22/06,	Richard Conviser	CEO of BAR/BRI

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1	2/23/06	("Conviser")	
2	07/11/06	John Costonis	Chancellor of Louisiana State
3			University
4	01/06/06	Robert Feinberg	President and CEO of PMBR
5			
6	06/20/06	Jonathan Grayer	Chairman and CEO of Kaplan
7			
8	06/13/06	Kandace Kukas	Marketing director for the North
9			Atlantic region of Kaplan
10	07/20/06	Ian MacDiarmid	Former employee of Kaplan
11			
12	06/21/06	David Oliveiri	Former employee of Thomson
13			Corporation
14	02/14/06	John Perovich	Former employee of Thomson
15			Corporation.
16	7/14/06	John Polstein	CEO of the Test Prep Division at
17			Kaplan.
18	07/07/06	Andrew Rosen	COO at Kaplan.
19			
20	02/07/06	Brian Sacks	Western regional director at BAR/BRI.
21			
22	06/14/06	Donna Skibbe	Employee of Kaplan and a former
23			employee of BAR/BRI and West Bar
24			Review ("West Bar").
25	06/23/06	Michael Suchsland	Executive at BAR/BRI
26			

9. Defendants deposed the seven Plaintiffs as well as non-party

1 witnesses Jack Goetz, Hugh Reed and Stanley Chess.

2 10. The Settling Parties also conducted extensive expert discovery,
3 including eight depositions of five different expert witnesses.

4 11. Plaintiffs and Defendants had a series of discovery disputes.
5 These discovery disputes resulted in a number of motions to compel before this
6 Court and Special Discovery Master John Francis Carroll, whose appointment was
7 also the subject of motion practice.

8 **F. Class Certification**

9 12. On March 13, 2006, Plaintiffs filed their motion for class
10 certification. Defendants raised many challenges, including the relevant market
11 definition, antitrust impact and the existence of a formulaic approach to damages.

12 13. On May 15, 2006, after comprehensive briefing, including the
13 submission of detailed expert declarations and exhibits as well as extended oral
14 argument, the Court certified a national class defined as: "All persons who
15 purchased a bar review course from BAR/BRI in the United States from 1997 to the
16 present." *See* Order filed May 15, 2006 (the "Class Certification Order").

17 14. The Court appointed Plaintiffs as the Class Representatives.

18 15. On June 29, 2006, after reviewing submissions from Plaintiffs
19 and Defendants concerning the proposed plan of notice to the Class, the Court
20 issued an Order Re Class Notice (the "Class Notice Order") which approved the
21 proposed form of notice, and provided for dissemination by: (a) first-class mail; (b)
22 in national publications; and (c) over the Internet. In accordance with the Class
23 Notice Order, the Class Action Notice was disseminated in July 2006. The Class
24 Action Notice provided Class Members the opportunity to request exclusion from
25 the Class.
26

27 16. Defendants filed a petition with the Court of Appeals for the
28 Ninth Circuit for leave to file an appeal regarding the Class Certification Order.

1 Plaintiffs filed an extensive opposition. The Ninth Circuit denied Defendants'
2 petition on August 11, 2006.

3 **G. Trial**

4 17. The original trial date for this Action was set for June 20, 2006.

5 18. At the request of the parties the trial date was continued to
6 September 12, 2006. The Court later continued the trial date to February 13, 2007
7 *sua sponte*.

8 **H. Summary Judgment**

9 19. On July 17, 2006, Kaplan filed a motion for summary judgment
10 seeking to dismiss Count II of the FAC (the only count against Kaplan). Plaintiffs
11 opposed the motion and subsequently sought leave to file two supplemental
12 opposition briefs to the motion, which the Court granted. The Court denied
13 Kaplan's motion for summary judgment. *See* Order filed September 18, 2006.

14 **I. Negotiation of the Settlement Agreement**

15 20. After completion of discovery and with the February trial date
16 approaching, the Settling Parties together with Rodriguez, Nesci, and Gintz (the
17 "Objecting Plaintiffs") engaged in a formal mediation in New York City on
18 November 29, 2006. The Honorable Daniel Weinstein (Ret.) of JAMS, who has
19 substantial experience in resolving antitrust and class action cases, served as
20 mediator. Plaintiffs were represented by Class Counsel; plaintiff Gintz was also
21 present. BAR/BRI was represented by Shearman & Sterling, LLP and Kaplan was
22 represented by Munger, Tolles & Olson LLP. Also present were in-house counsel
23 for Defendants and Conviser.

24 21. The record reflects that at all times, the negotiations were at
25 arm's-length and hard fought. The Settling Parties were unable to reach a
26 resolution on November 29, 2006.

27 22. Negotiations continued for the next several weeks with the
28

1 assistance of the mediator. Throughout this time, Class Counsel continued to
2 prosecute discovery disputes and prepare for trial. After several weeks of
3 negotiations, an agreement was reached on all Settlement terms (which was
4 supported by the mediator); the Settlement Agreement was executed on February 2,
5 2007.

6 23. The Objecting Plaintiffs refused to authorize the execution of
7 the Settlement Agreement on their behalf.

8 **II. THE TERMS OF THE SETTLEMENT**

9 **A. The Settlement Fund**

10 24. Consistent with the terms of the Settlement Agreement,
11 Defendants paid forty-nine million dollars into an interest-bearing account for the
12 benefit of the Class, which amount, plus interest (hereinafter, "Gross Settlement
13 Fund"), has or will be used to pay for the costs of notice, settlement administration,
14 taxes and attorneys' fees and expenses pursuant to the orders of this Court. After
15 such payments from the Gross Settlement Fund, the balance will be distributed to
16 the Class ("Net Settlement Fund") pursuant to the Plan of Allocation.

17 **B. Plan of Allocation**

18 25. Under the terms of the Plan of Allocation, the Net Settlement
19 Fund will be distributed *pro rata* based on the amount each Class Member who
20 submits a timely and valid Claim Form ("Authorized Claimant") paid BAR/BRI for
21 the bar review course in relation to the amounts paid by all other Authorized
22 Claimants. For example, if the amount paid for a bar review course by an
23 Authorized Claimant equals 1/100,000 of the aggregate of such amounts paid by all
24 other Authorized Claimants, then the Authorized Claimant will receive 1/100,000
25 of the Net Settlement Fund. The maximum amount of payment that any Authorized
26 Claimant shall be entitled to receive from the Net Settlement Fund, however, shall
27 not exceed thirty-percent (30%) of the amount the Authorized Claimant paid for the
28

1 bar review course (the "Maximum Payment").

2 26. Class Members also have the option of donating their portion
3 of the Net Settlement Fund to the National Legal Aid and Defender Association
4 ("NLADA"), for the purpose of providing training opportunities for young lawyers
5 nationwide. NLADA, founded in 1911, is the oldest and largest national, nonprofit
6 membership organization devoting all of its resources to advocating equal access to
7 justice for all people.

8 27. Defendants are not entitled to a reversion of any money
9 remaining in the Net Settlement Fund after distribution of the Maximum Payments
10 to all Authorized Claimants. If any funds remain in the Net Settlement Fund after
11 distributing the Maximum Payments to all Authorized Claimants, Class Counsel
12 will make an application to the Court for a *cy pres* distribution of the residual
13 amount of the Net Settlement Fund.

14 **C. Provisions to Promote Competition in the Bar Review Market**

15 28. For purposes of Settlement, BAR/BRI and Kaplan agreed to
16 terminate the marketing agreement that Plaintiffs allege is unlawful and has allowed
17 BAR/BRI to maintain a monopoly and Defendants to divide the market. Further,
18 for a period of five years following the Effective Date, BAR/BRI will include the
19 following statement on the forms it uses to enroll law students into its review
20 courses:
21

22 NOTE: By signing this Enrollment Form and making an initial
23 payment to BAR/BRI, you are not committing yourself to taking the
24 BAR/BRI Bar Review course or making full payment to BAR/BRI for
25 such course.

26 29. Finally, in the Settlement Agreement, BAR/BRI expressly
27 states "that it is committed to accurate advertising as required by the Lanham Act,
28 the Federal Trade Commission Act and similar laws, regulations and rules."

1 Settlement Agreement ¶ 39.

2 **D. Release**

3 30. Paragraphs 56 and 57 of the Settlement Agreement contain a
4 proposed Release, which is incorporated in the Judgment and Order Approving
5 Settlement, signed contemporaneously with these Findings of Fact and Conclusions
6 of Law (the "Settlement Order"). The Settlement Order provides that all Class
7 Members (including any of their past, present or future officers, directors, agents,
8 employees, legal representatives, trustees, parents, associates, affiliates, licensees,
9 subsidiaries, partners, heirs, executors, administrators, purchasers, predecessors,
10 successors, and assigns), with the exception of those who exercised their right to
11 opt out (identified in Exhibit A to the Settlement Order), whether or not he, she or it
12 objects to the Settlement and whether or not he, she or it makes a claim upon or
13 participates in the Settlement Fund, whether directly, representatively, derivatively
14 or in any other capacity, ever had, now has or hereafter can, shall or may have
15 concerning or relating to any conduct alleged in the FAC in this Action, and
16 including without limitation all claims that have been asserted or could have been
17 asserted in any litigation against the Released Parties or any of them for any
18 conduct alleged in the FAC in this Action (collectively with all claims referenced in
19 the next paragraph, the "Released Claims"), are permanently enjoined from filing,
20 commencing, prosecuting, intervening in, participating in (as class members or
21 otherwise), or receiving any benefits or other relief from, any other lawsuit,
22 arbitration or other proceeding against any or all Released Parties, or order in any
23 jurisdiction entered against any or all Released Parties that is based upon, arises out
24 of or relates to any Released Claims.

25
26 31. Notwithstanding the foregoing, the Released Claims shall not
27 include claims asserted against the named defendants as of February 2, 2007, in the
28 putative class actions, entitled *Park v. Thomson Corp., et al.*, Case No. 05 Civ. 2931

1 (WHP) and *Arendas v. Thomson Corp., et al.*, Case 6:06-cv-1113-Orl-28JGG,
2 currently pending in the United States District Court, Southern District of New
3 York (the “New York Actions”).

4 **III. JURISDICTION**

5 32. This Court has jurisdiction over the claims of Class Members
6 because Plaintiffs have alleged violations of federal laws, specifically the Sherman
7 Act, 15 U.S.C. § 1 and the Clayton Act, 15 U.S.C. § 18.

8 33. This Court can also exercise personal jurisdiction over all
9 absentee Class Members because Class Members received proper notice of the
10 Action.

11 34. The Class Action Notice informed potential Class Members of
12 the pendency of this Action and provided them with the opportunity to exclude
13 themselves from the Class.

14 35. The Notice informed Class Members of their opportunity to
15 object to the Settlement and to be heard at the Final Settlement Hearing. Such
16 notice satisfies the due process requirements of the Fifth Amendment. *Brown v.*
17 *Ticor Title Inc.*, 982 F2d 386, 392 (9th Cir. 1992).

18 **IV. PRELIMINARY APPROVAL**

19 36. On March 19, 2006, over the objections of the Objecting
20 Plaintiffs, this Court entered an Order Granting Plaintiffs’ Motion for Preliminary
21 Approval of Class Action Settlement and Directing Dissemination of Notice to
22 Class (the “Preliminary Approval Order”) that, among other things: (a) found that
23 the Settlement Agreement was negotiated in good faith, under the supervision of a
24 well-respected mediator, resulted from extensive arm’s length negotiations, was
25 concluded after Class Counsel conducted broad discovery and was sufficiently fair,
26 reasonable and adequate to warrant sending notice of the Settlement to Class
27 Members and holding a full hearing on the Settlement; (b) modified the definition
28

1 of the previously certified class to: "All Persons who purchased a bar review course
2 from BAR/BRI in the United States from August 1, 1997 through and including
3 July 31, 2006"; (c) found that the proposed forms and methods of notice met the
4 requirements of the Federal Rules of Civil Procedure, the United States
5 Constitution, the Rules of the Court and any other applicable law; (d) appointed
6 Complete Claim Solutions, LLC ("CCS") as Claims Administrator; (e) established
7 procedures for Class Members to object to the Settlement; and (f) established the
8 date for the Final Settlement Hearing.

9
10 **V. NOTICE TO THE CLASS OF THE SETTLEMENT**

11 37. The Settling Parties have provided extensive individual notice
12 to Class Members. Pursuant to the Preliminary Approval Order, CCS caused a copy
13 of the Notice and Claim Form to be sent *via* first-class mail to the last known postal
14 address of each Class Member, as updated through the United States Postal Service
15 National Change of Address service. A total of approximately 376,000 Notices
16 were sent.

17 38. The Summary Notice was published in: (a) *The National Law*
18 *Journal* on April 23 and 30, 2007; (b) *Lawyers Weekly USA* on April 23, May 7 and
19 21, 2007; and (c) *USA Today* on April 18, 2007. The Summary Notice was also
20 distributed through PR Newswire on May 8, 2007 and was sent *via* first-class mail
21 to the office manager of each law firm listed on the most recent "*AmLaw 200 list*".
22 In addition, the Notice and Summary Notice were posted on Class Counsel's
23 websites.

24 39. Under Class Counsel's direction and supervision, CCS updated
25 the official BAR/BRI class action website at *www.barbri-classaction.com* to
26 provide Class Members information about the Settlement. The website provided
27 Class Members with important dates regarding the Settlement, answers to
28 "frequently asked questions," copies of the Notice and Claim Form, the Settlement

1 Agreement, the Plan of Allocation, as well as certain other relevant pleadings in the
2 Action.

3 40. Under Class Counsel's direction and supervision, CCS
4 established a toll-free interactive voice response system which also provided
5 answers to frequently asked questions. Class Members were also able to speak with
6 a live operator at CCS. Additionally, CCS established an email box for Class
7 members who wish to request additional information by email.

8 41. Finally, Class Counsel set up a response team comprised of
9 several attorneys and paralegals to respond to questions from Class Members about
10 the Settlement.

11 42. The Notice included summaries of the Release and the Plan of
12 Allocation, and provided detailed information about the Settlement benefits
13 available to the Class Members, including their right to object to the Settlement and
14 to appear at the Final Settlement Hearing.

15 **VI. THE NOTICE SATISFIED ALL APPLICABLE REQUIREMENTS**

16 43. The Preliminary Approval Order approved the procedures for
17 notifying Class Members about the Settlement Agreement, as well as the form of
18 the Notice and the Summary Notice. The form of such an order is within this
19 Court's discretion. *See In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1127 (9th Cir.
20 1977) ("Rule 23(d)(2), of course, does not provide for a specific manner of notice
21 or the form of the notice. These are matters left to the court's discretion to be
22 dictated by the circumstances of each case.) The Settling Parties provided
23 extensive and sufficient notice to Class Members, and the methodology by which it
24 was provided not only meets, but exceeds, all requirements for notice in a class
25 action settlement.

26 44. In order to satisfy due process requirements, notice to Settlement
27 Class Members must generally describe the terms of the settlement in sufficient
28

1 detail to alert those with adverse viewpoints to investigate and to come forward and
2 be heard.” *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993)
3 (quoting *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977)); *In re*
4 *Aetna Inc. Secs. Litig.*, MDL No. 1219, 2001 WL 20928 at * 5 (E.D. Pa. Jan. 4,
5 2001) (Notice must be “reasonably calculated under all the circumstances, to
6 apprise interested parties of the pendency of the action and afford them an
7 opportunity to present their objections.” (quoting *Mullane v. Cent. Hanover Bank &*
8 *Trust Co.*, 339 U.S. 306, 314-15 (1950) (citation omitted)).

9
10 **A. The Contents of the Notice Satisfy Due Process**

11 45. A settlement notice is a summary, not a complete source of
12 information. This circuit requires a very general description of the proposed
13 settlement in such a notice. *See Churchill Village, L.L.C. v. General Electric*, 361
14 F.3d at 575 (9th Cir. 2004) (“[N]otice is satisfactory if it ‘generally describes the
15 terms of the settlement in sufficient detail to alert those with adverse viewpoints to
16 investigate and to come forward and be heard’”) (quoting *Mendoza v. Tucson*
17 *School Dist. No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980)); *Torrise*, 8 F.3d at, 1374.

18 46. Proper notice should provide: (a) the material terms of the
19 proposed settlement; (b) disclosure of any special benefit to the class
20 representatives; (c) disclosure of the attorneys’ fees provisions; (d) the time and
21 place of the final approval hearing and the method for objecting to the settlement;
22 (e) an explanation regarding the procedures for allocating and distributing the
23 settlement funds; and (f) the address and phone number of class counsel and the
24 procedures for making inquiries. *See Marshall v. Holiday Magic*, 550 F.2d at 1178.

25 47. The Notice and the Summary Notice provided all of the required
26 information: a description of the material terms of the Settlement; a description of
27 the monetary and non-monetary relief and the Plan of Allocation; the applications
28 for the Incentive Awards and the amounts; Class Counsel's intent to apply for a Fee

1 Award in the amount of twenty-five percent (25%) of the Gross Settlement Fund
2 and for reimbursement of expenses; and the contact information for Class Counsel,
3 including how to make inquiries. The Notice also included the date, time, and place
4 of the Final Settlement Hearing, described how to object, and informed Class
5 Members that any objection must be filed with the Court and delivered to Class
6 Counsel and counsel for Defendants no later than May 21, 2007.

7
8 48. The Notice further advised Class Members that if the Settlement
9 is approved, Defendants will be released of any liability to the Class Members
10 arising out of the conduct alleged or which could have been alleged in this Action,
11 with the exception of the claims asserted in the New York Actions.

12 49. The Notice's content advised Class Members of the information
13 that is material to making an informed and intelligent decision respecting whether
14 to participate in the Settlement or not. *See In re Equity Funding Corp. of America*
15 *Securities Litigation*, 603 F.2d 1353, 1361 (9th Cir. 1979) (approving notice
16 because "the Notice informed the appellants of the subject matter and terms of the
17 proposed settlements and Plan of Allocation at the time the Notice was sent out");
18 *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 332 (E.D. Pa. 1993) ("The
19 standard then is that the notice required by [Rule 23](c)(2) must contain information
20 that a reasonable person would consider to be material in making an informed,
21 intelligent decision of whether to opt out or remain a member of the class and be
22 bound by the final judgment.") (quoting *In re Nissan Motor Corp. Antitrust Litig.*,
23 552 F.2d 1088, 1105 (5th Cir. 1977)).

24 50. The Notice and Summary Notice provided sufficient information
25 for Class Members to understand the proposed Settlement Agreement and their
26 options. *See In re Cendant Corp. Secs. Litig.*, 109 F. Supp. 2d 235, 254 (D.N.J.
27 2000) (finding due process satisfied where the notice informs class members of (a)
28 the nature of litigation; (b) general terms of the settlement; (c) where to locate

1 complete information; and (d) the place and time of the hearing where objections
2 may be heard).

3 **B. The Dissemination Plan Satisfies Due Process**

4 51. There is no statutory or due process requirement that all class
5 members receive actual notice by mail or other means; rather, "individual notice
6 must be provided to those Class Members who are identifiable through reasonable
7 effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974). "Rule 23(e)
8 gives the Court 'virtually complete' discretion as to the manner of service of
9 settlement notice." *Colesberry v. Ruiz Food Products, Inc.*, No. CV F 04-5516,
10 2006 WL 1875444, at *7 (E.D. Cal. Jun. 30, 2006) (citing *Franks v. Kroger Co.*,
11 649 F.2d 1216, 1222-23 (6th Cir. 1981)). Here, the Notice was disseminated via
12 individual mailing and publication. As the highest standard of notice, the Notice
13 satisfies the due process requirement.

14 52. In this Action, as stated above, the Notice was mailed by first
15 class mail to each Class Member identified from Defendants' records, which CCS
16 reviewed and formatted to ensure standardization and removal of duplicate and
17 non-mailable records. The Notice was also made available on a variety of internet
18 sites – including that of the Claims Administrator and Class Counsel. In addition,
19 the Summary Notice describing the principal terms of the Settlement Agreement
20 and providing information respecting how a more detailed description of the
21 Settlement Agreement could be obtained was published in *The National Law*
22 *Journal* (two insertions), *Lawyers Weekly USA* (three insertions) and *USA Today*.
23 The Summary Notice was sent by first-class mail to the largest 200 law firms in the
24 United States as listed in *American Lawyer*. These publications and the mailing to
25 the 200 largest law firms specifically targeted the Class.

26 53. The procedures used for providing notice in this case satisfy the
27 Federal Rules and due process requirements. *See, e.g., Silber v. Mobon*, 18 F. 33
28

1 1449, 1452-54 (9th Cir. 1994)(approving notice sent by first class mail as the “best
2 notice practicable”); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758
3 F.2d 86, 90 (3d Cir. 1985) (“It is well settled that in the usual situation first-class
4 mail and publication in the press fully satisfy the Notice requirement of both Fed.
5 R. Civ. 23 and the due process clause.”) (citations omitted); *Montgomery v.*
6 *Beneficial Consumer Disc. Co.*, No. 04- 2114, 2005 WL 497776, at * 6 (E.D. Pa.
7 Mar. 2, 2005) (individual mailing accompanied by publication in USA Today was
8 best practicable notice under the circumstances; “[d]ue process does not require
9 actual notice, but rather a good faith effort to provide actual notice”) (quoting Alba
10 Conte and Herbert B. Newberg, *Newberg on Class Actions* § 11:53 (4th ed. 2002)
11 (hereafter “*Newberg*”).
12

13 54. The Court thus affirms its findings in the Preliminary Approval
14 Order that the notice in this case and the notice methodology are the best
15 practicable notice and meet the requirements of the Federal Rules of Civil
16 Procedure (including Fed. R. Civ. P. 23), the United States Constitution (including
17 the Due Process Clause), the Rules of this Court and any other applicable law.
18

19 VII. FINAL APPROVAL OF THE SETTLEMENT

20 A. Written Submissions

21 55. Class Counsel and Defendants filed submissions in support of
22 the Settlement Agreement and the Objecting Plaintiffs filed submissions in
23 opposition to the Settlement Agreement as follows:

24 (a) On May 17, 2007, Class Counsel filed: (i) Notice of
25 Motion and Motion For Final Approval of Class Action Settlement; (ii)
26 Declaration of Sidney K. Kanazawa; and (iii) Memorandum of Points and
27 Authorities in Support of Final Approval;

28 (b) On May 17, 2007, the Objecting Plaintiffs filed an

1 objection, *inter alia* objecting to entry of the Preliminary Approval Order (the “May
2 17 Objections”);

3 (c) On May 18, 2007, Class Counsel filed a response to
4 the May 17 Objections;

5 (d) On May 31, 2007, the Objecting Plaintiffs filed an
6 *ex parte* application, memorandum and declaration for an order to: (i) allow Eliot
7 Disner, Esq. (“Disner”) to “speak freely” on their behalf; (ii) allow access to certain
8 files; and (iii) clarify the status of Disner as a “co-lead counsel” (the “*Ex Parte*
9 Application”);

10 (e) On June 1, 2007, Class Counsel filed an Opposition
11 to the *Ex Parte* Application and Defendants filed objections to the *Ex Parte*
12 Application (the “*Ex Parte* Oppositions”); and

13 (f) On June 7, 2007, the Objecting Plaintiffs filed a
14 reply to the *Ex Parte* Oppositions.
15

16 56. In addition to the May 17 Objections, the purported Class
17 Members listed in the following table filed Objections to the Settlement on the
18 dates indicated (together with the May 17 Objections, the “Objections”):

19

Date Filed	Class Member
May 21, 2007	David Oriol (the “Oriol Objector”)
May 21, 2007	Jason Tingle Oliver Gutierrez (the “Tingle Objections”)
May 21, 2007	David Feldman Cameron Gharabiklou Emily Grant Jeff Lang Sarah McDonald

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Date Filed	Class Member
	Cara Patton Rachel Schwartz Greg Thomas (the "Feldman Objectors")
May 21, 2007	Joseph J. Angersola
May 21, 2007	Anthony Valach
May 21, 2007	Jay M. Wolman (the "Wolman Objector")
May 21, 2007	Joan E. Shreffler
May 21, 2007	Robert Gaudet, Sandeep Gopalan Elizabeth De Long Andrea Boggio (the "Gaudet Objectors")
May 21, 2007	Justin Head Ryan Helfrich (the "Head Objectors")
May 21, 2007	George Schneider Jonathan Slomba James Puntumapanitch (the "Schneider Objectors")
May 21, 2007	James Juranek Audrey Juranek Richard P. Le Blanc, III. (the "Juranek Objectors")
May 12, 2007	Arcelia Trevino (the "Trevino Objector")
May 21, 2007	Aaron Lukoff John Prendergast David Orange (the "Lukoff Objectors")

Date Filed	Class Member
May 22, 2007	Daryl Chilimidos (the "Chilimidos Objector")
May 22, 2007	Nikki Love John Bernitz (the "Love Objectors")
May 22, 2007	Daniel M. Schaefer (the "Schaefer Objector")
May 22, 2007	Evans & Mullinix, P.A. (the "Evans & Mullinix Objectors")
May 22, 2007	Sarah Siegel (the "Siegel Objector")
May 22, 2007	Jennifer Brown McElroy (the "McElroy Objector")
May 22, 2007	Andrew Gilman Stephen M. Vasil
May 23, 2007	David Harris Kareem Kamal Matthew Kavanaugh Simon Newfield Jonathan Ricasa Abigail Treanor David Zelenski (the "Harris Objector")
May 23, 2007	Pamela Collins (the "Collins Objector")
April 10, 2007	Craig Walenta
May 28, 2007	Richard A. Bodmer
June 12, 2007	Stephen Lindholm

57. On June 11, 2007, Class Counsel filed: (a) a reply memorandum in support of the Settlement which addressed the Objections; and (b) the

1 declarations of: (i) Sidney K. Kanazawa; (ii) Christine Pedigo Bartholomew; (iii)
2 Richard Sartory of CCS; and (iv) Hon. Daniel Weinstein.

3 58. On June 11, 2007, Defendants filed Defendants' Combined
4 Response To Various Class Members' Objections To Stipulation And Settlement
5 Agreement ("Defendants' Combined Response"). Also on June 11, 2007,
6 BAR/BRI filed a reply memorandum to the May 17 Objections.

7 59. On June 15, 2007, Kaplan filed: (a) Notice of Filing of
8 Declaration of Lee S. Taylor in Support of Motion for Final Approval of
9 Settlement, Regarding Kaplan's Compliance with the Requirements of the Class
10 Action Fairness Act; and (b) Declaration of Lee S. Taylor, and subsequently filed:
11 (a) Notice of Filing of Revised Declaration of Lee S. Taylor in Support of Motion
12 for Final Approval of Settlement, Regarding Kaplan's Compliance with the
13 Requirements of the Class Action Fairness Act; (b) Revised Declaration of Lee S.
14 Taylor; Notice of Filing Under Seal; and (c) Declaration of Lee S. Taylor
15 Authenticating and Attaching Documents.

16 60. On June 18, 2007, BAR/BRI filed the Declaration of James P.
17 Tallon Regarding the Class Action Fairness Act.

18 61. On June 18, 2007, the Court ordered additional briefing to be
19 submitted with regard to the issue of a *cy pres* distribution (the "June 18 Order").

20 62. Pursuant to the Court's June 18 Order, on June 26, 2007, Class
21 Counsel filed: (a) Settling Plaintiffs' Supplemental Briefing In Support of Motion
22 for Final Approval Re: 30% Distribution Limit To Authorized Claimants and Cy
23 Pres Fund for Remainder; (b) Declaration of Sidney K. Kanazawa; and (c)
24 Declaration of Richard L. Sartory of CCS. Also, on that date, Defendants filed: (a)
25 Defendants' Supplemental Brief Regarding Approval of Proposed Settlement,
26 Addressing Cy Pres Provision of Proposed Settlement; and (b) the Declaration of
27 Stuart N. Senator.
28

1 63. In addition, on June 26, 2007, several Objectors including the
2 Juranek Objectors and the Harris Objectors, submitted additional briefing in further
3 opposition to final approval of the Settlement.

4 64. On July 5, 2007, Disner filed a Summary of Evidence Regarding
5 Defendant West Publishing Co.'s Violation of Section 2 of the Sherman Act (15
6 U.S.C. § 2) and a Re-Notice of Appearance of Counsel.

7 65. As noted above, the number of Objections was small. The
8 Objectors raised issues regarding the following topics: (a) the Objecting Plaintiffs
9 opposed the Settlement; (b) Plaintiffs' Section 7 claim should be bifurcated from
10 the Sherman Act claims; (c) Plaintiffs' case against the Defendants is too strong; (d)
11 the Settlement Fund is insufficient; (e) the lack of a provision prohibiting future
12 misconduct or dissolution; (f) the scope of the Release; (g) the possibility of a cap
13 on individual Class Member's recovery and a *cypres* award; (h) the failure to
14 provide for a second opt-out chance; (i) the sealing of certain confidential
15 documents obtained in discovery; (j) the Claim Form procedure renders the
16 Settlement unfair; (k) the sufficiency of the Notice; and (l) the adequacy of Class
17 Counsel.

18
19 **B. The Final Approval Hearing**

20 66. On June 18, 2007 and July 9, 2007, the Court conducted
21 hearings on the fairness, reasonableness, and adequacy of the Settlement.

22 67. Twelve groups of Objectors were represented at the Final
23 Approval Hearing (through counsel). Two of the three Objecting Plaintiffs - Nesci
24 and Rodriguez - were also present.

25 68. The Objectors (other than the Objecting Plaintiffs) were
26 represented at the Final Approval Hearing by: (a) Alan Harris, Esq. (on behalf of
27 the Harris Objectors); (b) Howard Steele, Esq., Charles Steiner, Esq., and Ron
28 Rosengarten, Esq. (on behalf of the Juranek Objectors); (c) Alexandra Steinberg,

1 Esq. (on behalf of the Trevino Objector); (d) John Davis, Esq. (on behalf of the
 2 Feldman Objectors); (e) Robert Gaudet, Jr., Esq. (on behalf of the Gaudet
 3 Objectors); (f) Ben Nutley, Esq. (on behalf of Head Objectors); (g) Robert
 4 Chojnakci, Esq. (on behalf of the Oriol Objectors); (h) Ken Nelson, Esq. (on behalf
 5 of the Evans & Mullinix Objectors); (i) Emily Greer, Esq. (on behalf of the Love
 6 Objectors); (j) Leo Collins, Esq. (on behalf of the Collins Objector); and (k) Darnell
 7 Palmer, Esq. (on behalf of the Evans & Mullinix Objectors, the McElroy Objector
 8 and the Schaefer Objector). In addition, Perrin Disner, the son of Disner appeared
 9 *pro se* as an objector, although he did not comply with the procedure for objecting
 10 set forth in the Preliminary Approval Order.

11 **VIII. FAIRNESS OF THE SETTLEMENT AGREEMENT**

12 **A. The Settlement Agreement Enjoys a Presumption of Fairness**

13
 14 69. In the Ninth Circuit, a court affords a presumption of fairness to
 15 a settlement, if: "(1) the negotiations occurred at arm's length; (2) there was
 16 sufficient discovery; (3) the proponents of the settlement are experienced in similar
 17 litigation; and (4) only a small fraction of the class objected." *Young v. Polo Retail*,
 18 No. C-02-4546 VRW, 2006 WL 3 050861, at 5 (N.D. Ca. Oct. 25, 2006); *Newberg*
 19 at § 11.41. As described above, the Settlement was reached only after extensive
 20 discovery had been conducted. Settlement negotiations occurred at arm's length for
 21 three months with the assistance of a mediator and on the eve of trial.

22 70. Both Class Counsel and Defendants' counsel are experienced in
 23 class actions, including antitrust class actions. Moreover, the Class' reaction to the
 24 Settlement Agreement has been overwhelmingly positive, and only a small fraction
 25 of the Class has objected to the Settlement. The Settlement Agreement thus enjoys
 26 a presumption of fairness.

27 **B. The Settlement Agreement is Fair, Adequate and Reasonable**

28 71. The Ninth Circuit has articulated eight factors to evaluate a

1 settlement's fairness, adequacy, and reasonableness:

- 2 (a) The strength of plaintiffs' case;
- 3 (b) The risk, expense, complexity, and likely duration of further
- 4 litigation;
- 5 (c) The risk of maintaining class action status throughout the
- 6 trial;
- 7 (d) The amount offered in settlement;
- 8 (e) The extent of discovery completed, and the stage of the
- 9 proceedings;
- 10 (f) The experience and views of counsel;
- 11 (g) The presence of a governmental participant,² and
- 12 (h) The reaction of the class members to the proposed
- 13 settlement.

14 *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150
15 F.3d 1011, 1026 (9th Cir. 1998).

16
17 **1. The Strength of Plaintiffs' Case**

18 72. Plaintiffs prevailed on Kaplan's motion for summary judgment
19 and believe they would prevail on any motion for summary judgment filed by
20 BAR/BRI. Nevertheless, defeating these motions does not mean that Plaintiffs
21 established Defendants' *prima facie* liability; whether they would obtain a
22 favorable, unanimous jury verdict as required by Fed. R. Civ. P. 48 is far from
23 guaranteed. *See, e.g., In re Airline Ticket Com'n Antitrust Litig.*, 953 F.Supp. 280,
24 283 (D. Minn. 1997) (approving settlement although it did not provide a full
25 recovery of the potential losses and noting that objectors failed to appreciate that on
26 summary judgment, the court only decided that defendants did not prevail as a

27
28 ² There was no governmental presence with respect to the claims set forth in the Action.

1 matter of law, not that plaintiffs had a winning case).

2 73. To prove their claim for violation of Section 1 of the Sherman
3 Act, Plaintiffs have to show that Defendants combined, conspired and contracted
4 among themselves to eliminate competition in the bar review course market
5 throughout the United States for the purpose and with the effect of raising,
6 depressing, fixing, pegging, or stabilizing the price of a commodity in interstate
7 commerce. *See Palmer v. BRG*, 498 U.S. 46, 48 (1990). Plaintiffs' Section 1 claim
8 is based on Kaplan's withdrawal from a letter of intent to purchase West Bar and its
9 subsequent agreement with BAR/BRI. Kaplan and BAR/BRI, however, point to
10 documentary and testimonial evidence to support their defense that the 1997
11 agreement between them was not an illegal market allocation agreement, but a
12 *bona-fide* co-marketing agreement executed after Kaplan made a legitimate
13 business decision not to go forward with acquiring West Bar due to its poor
14 financial forecast for the business. While Plaintiffs claim to have evidence to rebut
15 Defendants' defenses, litigation is uncertain and Plaintiffs could lose on this point
16 as equally as they could prevail. *See In re Superior Beverage/Glass Container*
17 *Consolidated Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990) (stating that "[t]he
18 'best' case can be lost and the 'worst' case can be won . . .").

19 74. There is also no guarantee that Plaintiffs would prevail on their
20 Section 2 claim. To establish their Section 2 claim, Plaintiffs would have to prove
21 that BAR/BRI has significant market power and engaged in wrongful conduct to
22 obtain and preserve its monopoly power on a national scale, thereby injuring
23 Plaintiffs and the Class. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,
24 472 U.S. 585, 596 (1985). BAR/BRI, however, argues that its market position is
25 the result of innovation and high-quality products and services, not illegal conduct.
26 Further, BAR/BRI has proffered evidence showing that the relevant product market
27 is not national, but state specific, and the geographic markets are local and
28

1 metropolitan areas. BAR/BRI also argued that the conduct alleged in the FAC to
2 support the Section 2 claim was (i) not substantiated in discovery, (ii) local and
3 limited in impact, and (iii) too remote in time. Again, while Plaintiffs believe they
4 have strong evidence to the contrary, it is not inconceivable that a jury could agree
5 with and decide in favor of BAR/BRI.

6 75. Similarly, there is no guarantee that Plaintiffs would prevail on
7 their Section 7 claim under the Clayton Act, which prohibits mergers, acquisitions
8 and joint ventures “that may substantially lessen competition or tend to create a
9 monopoly in a market.” 15 U.S.C. § 18. BAR/BRI claims it did not violate Section
10 7 by acquiring West Bar as Plaintiffs allege. Rather, BAR/BRI claims its conduct
11 was pro-competitive and did not diminish competition. BAR/BRI claims it had
12 both testimony and documentary evidence showing that West Bar was already
13 defunct when BAR/BRI agreed to provide bar review courses to West Bar’s
14 customers so that BAR/BRI did not acquire West Bar or diminish competition.
15 Again, while Plaintiffs claim to have rebuttal evidence, they have no crystal ball to
16 allow them to foresee which way the Court and/or a jury would find on this issue.

17 76. Defendants also raise the statute of limitations defense. If the
18 Court or the jury determined that the statute precluded the claims of certain Class
19 Members, thereby decreasing the size of the Class and impacting the damages
20 analysis relied upon by Class Counsel in negotiating the Settlement, then the Class
21 may recover significantly less than what was achieved by the Settlement.

22 23 24 **2. The Risk, Expense, Complexity and Duration of Continued 25 Litigation**

26 77. These factors consider “the probable costs, in both time and
27 money, of continued litigation.” *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D.
28 231, 254 (D. Del. 2002). In most cases, “unless the settlement is clearly inadequate,

1 its acceptance and approval are preferable to lengthy and expensive litigation with
2 uncertain results.” *National Rural Telecommunications Coop. v. DIRECTV, Inc.*,
3 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting *Newberg*, § 11:50 at 155). Indeed,
4 it has been held proper “to take the bird in hand instead of a prospective flock in the
5 bush.” *DIRECTV*, 221 F.R.D. at 526 (quoting *Oppenlander v. Standard Oil Co.*, 64
6 F.R.D. 597, 624 (D. Colo. 1974)). Settlement is encouraged in class actions where
7 possible. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976) (“It
8 hardly seems necessary to point out that there is an overriding public interest in
9 settling and quieting litigation. This is particularly true in class action suits which
10 are now an ever increasing burden to so many federal courts and which frequently
11 present serious problems of management and expense.”).

12
13 78. There is no question that this Action is complex and, if not
14 settled, its potential to result in enormous expense and lengthy duration is great.
15 Antitrust class actions “are notoriously complex, protracted, and bitterly fought”
16 and “arguably the most complex actions to prosecute.” *In re Visa*
17 *Check/MasterMoney Antitrust Litig.*, 297 F.Supp.2d 503, 510 (E.D.N.Y. 2003)
18 (quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp.713, 719 (E.D.N.Y.
19 1989)); *In re Motorsports Merch. Antitrust Litig.*, 112 F.Supp.2d 1329, 1337 (N.D.
20 Ga. 2000).

21 79. This antitrust case is no different; it would surely involve further
22 expense in addition to the amounts already expended if the Action proceeded to
23 trial. For instance, proceeding to trial would require additional discovery, including
24 the resolution of a number of motions to compel that were pending at the time the
25 Settling Parties reached Settlement; the briefing and resolution of numerous
26 motions *in limine* yet to be filed; and cross-*Daubert* motions would certainly be
27 filed. Plaintiffs would also have to oppose BAR/BRI’s motion for summary
28 judgment and motion to bifurcate the trial. These costs would substantially increase

1 the significant costs and fees already incurred.

2 80. Additionally, the litigation would most likely take several years
3 to finally resolve, considering the length of trial and appeals. Accordingly,
4 avoiding a trial and inevitable appeals in this complex, antitrust suit strongly weigh
5 in support of approval of the Settlement, rather than prolonged and uncertain
6 litigation. *See DIRECTV*, 221 F.R.D. at 527 (“Avoiding such a trial and the
7 subsequent appeals in this complex case strongly militates in favor of settlement
8 rather than further protracted and uncertain litigation”).

9
10 **3. The Risks of Maintaining Class Certification throughout**
11 **Trial**

12 81. This Court certified a nationwide Class. Although Plaintiffs
13 believe it is unlikely, there is no guarantee that Defendants would not move for and
14 obtain decertification of the Class before or during trial. *See In re Nasdaq Market-*
15 *Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). As noted by one
16 court, if “insurmountable management problems were to develop at any point, class
17 certification can be revisited at any time under Fed.R.Civ.P. 23(c)(1).” *Id.* Further,
18 even if the Class remained certified throughout the trial and Plaintiffs prevailed,
19 Defendants would surely challenge class certification on appeal. If at any point the
20 Class were decertified or certification were reversed on appeal, the Class would
21 recover nothing. Thus, this factor also weighs in favor of the Settlement.

22 **4. The Relief Offered in Settlement**

23 82. The Settlement provides a significant Settlement Fund of \$49
24 million as well as valuable non-monetary relief. Defendants deposited this money
25 into an escrow account on April 6, 2007 where it is currently earning interest for the
26 benefit of the Class.

27 83. When compared to Defendants’ expert’s estimated damages, the
28 \$49 million is an excellent result. According to Defendants’ experts, the Class

1 suffered no antitrust impact or damages respecting Plaintiffs' Section 2 claim under
2 the Sherman Act or Section 7 claim under the Clayton Act. Defendant's expert
3 further opined that Plaintiffs suffered no antitrust impact or damages with respect to
4 Plaintiffs' Section 1 claim under the Sherman Act, but if they did, it was limited to
5 at most, approximately \$7 million. Therefore, the \$49 million represents seven
6 times more than Defendants' expert's most generous estimate of damages.

7
8 84. While the \$49 million does not represent Plaintiffs' expert's full
9 amount of estimated damages, "settlement is about compromise, a yielding of the
10 highest hopes in exchange for certainty and resolution." *In re Warfarin*, 212 F.R.D.
11 at 257. The \$49 million does, however, represent approximately thirty-percent
12 (30%) of Plaintiffs' damages, estimated by their expert to be in the range of \$158
13 million to \$168 million. Thus, the \$49 million represents a significant portion of
14 Plaintiffs' expert's estimated damages. Moreover, Defendants made clear their
15 intention to mount a substantial attack on Plaintiffs' damages expert on multiple
16 grounds as set forth in Defendants' Combined Response. While Plaintiffs believe
17 that they could have overcome these anticipated attacks, the outcome was uncertain.

18 85. Courts have routinely approved class action settlements where
19 the settlement amount is in the percentage range of the claimed amount of damages
20 here, as well as where the settlement amount was a substantially lower percentage
21 of the claimed amount of damages. *See In re Cendant Corp. Litig.*, 264 F.3d at
22 241 (noting that recoveries can range from 1.6% to 14% and affirming settlement
23 representing 36% of recovery); *Nichols v. Smithkline Beecham Corp.*, No. 00-6222,
24 2005 WL 950616, at *16 (E.D. Pa. April 22, 2005) (approving settlement that
25 represented between 9.3% and 13.9% of the claimed damages); *In re Warfarin*, 212
26 F.R.D. at 258 (finding settlement amount representing 33% of maximum possible
27 recovery was well within a reasonable range when compared with recovery
28 percentages in other class action settlements).

1 86. Although Plaintiffs believe their case is strong and that they
2 could recover damages at trial, there is always the risk that Plaintiffs may not
3 recover anything. “The history of antitrust litigation is replete with cases in which
4 antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or
5 negligible damages, at trial or on appeal.” *In re Nasdaq*, 187 F.R.D. at 476.

6 87. Further, if the case did not settle, Plaintiffs risk the valuable non-
7 monetary relief that Class Counsel negotiated. This relief addresses many of the
8 concerns that prompted the filing of this lawsuit, such as the “market allocation”
9 agreement between BAR/BRI and Kaplan that Plaintiffs allege is illegal and other
10 barriers to entry. This valuable non-monetary relief, in addition to the significant
11 fund of \$49 million, weigh heavily in favor of Settlement.

12
13 **5. The Extent of Discovery Completed and the Stage of**
14 **Proceedings When the Parties Reached the Settlement**

15 88. “To approve a proposed settlement, the Court need not find that
16 the parties have engaged in extensive discovery.” *In re Austrian and German Bank*
17 *Holocaust Litig.*, 80 F.Supp.2d 164, 176 (S.D.N.Y. 2000). However, “the pretrial
18 negotiations and discovery must be sufficiently adversarial that they are not
19 designed to justify a settlement . . . [but] an aggressive effort to ferret out facts
20 helpful to the prosecution of trial.” *Id.* (quoting *Martens v. Smith Barney, Inc.*, 181
21 F.R.D. 243, 263 (S.D.N.Y. 1998)). What is required is that “sufficient discovery
22 has been taken or investigation completed to enable counsel and the court to act
23 intelligently.” *Newberg* at § 11:41.

24 89. The record here supports final approval of the Settlement. Class
25 Counsel conducted extensive discovery regarding each of the relevant issues in the
26 case, such as: (a) the negotiation, terms and impact of the co-marketing agreement
27 between BAR/BRI and Kaplan; (b) BAR/BRI’s competitive activities and
28 interactions with competitors; (c) BAR/BRI’s purchase of West Bar’s assets; (d) the

1 geographic market for bar review courses; (e) market shares; and (f) barriers to
2 entry and market conditions. Plaintiffs also deposed fourteen fact witnesses,
3 deposed each of Defendants' experts on issues relating to liability, damages, and
4 class certification, and reviewed and analyzed more than 400,000 pages of
5 documents.

6 90. Further, at the time Class Counsel negotiated the Settlement, the
7 Settling Parties had the benefit of key briefing and rulings on class certification and
8 Kaplan's motion for summary adjudication. Accordingly, when Class Counsel
9 negotiated the Settlement, they had more than sufficient information to adequately
10 assess the strengths and weaknesses of the case. The amount of discovery taken in
11 this case and the stage of the proceedings weighs heavily in favor of the Settlement.
12 *See DIRECTV*, 221 F.R.D. at 528 ("A settlement following sufficient discovery and
13 genuine arms-length negotiation is presumed fair").

14 **6. The Experience and Views of Counsel Favor Final Approval**

15 91. In assessing the adequacy of the terms of a settlement, the trial
16 court is entitled to and should rely upon the judgment of experienced counsel for
17 the parties. *See DIRECTV*, 221 F.R.D. at 528 ("Great weight is accorded to the
18 recommendation of counsel, who are most closely acquainted with the facts of the
19 underlying litigation" (internal quotations and citations omitted)); *see also Cotton*
20 *v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). The basis for such reliance is that
21 "[p]arties represented by competent counsel are better positioned than courts to
22 produce a settlement that fairly reflects each party's expected outcome in the
23 litigation." *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).
24 Indeed, when evaluating a proposed settlement, the trial judge, absent fraud,
25 collusion, or the like, should be hesitant to substitute its own judgment for that of
26 counsel. *See Flinn v. FMC Corporation*, 528 F.2d 1169, 1173 (4th Cir. 1975);
27 *Hanrahan v. Britt*, 174 F.R.D. 356, 366-368 (E.D. Pa. 1997) (presumption of
28

1 correctness applies to a class action settlement reached in arm's length negotiations
2 between experienced, capable counsel after meaningful discovery, citing *Manual*
3 *for Complex Litigation* § 30.41 (2nd ed. 1985)).

4 92. Class Counsel have considerable experience in litigating
5 antitrust matters, class actions, and other complex litigation, as their firm resumés
6 show.

7 93. After thorough consideration, Class Counsel concluded that the
8 Settlement terms are fair, adequate and reasonable and in the best interests of the
9 Class as a whole, and recommended that it be granted final approval. In
10 negotiating the terms of the Settlement, Class Counsel represented that they
11 considered a multitude of factors, including: (a) the nature and complexity of the
12 alleged offenses; (b) the availability and admissibility of evidence to support each
13 of the required elements of the alleged causes of action; (c) the nature and
14 idiosyncrasies of the bar review business; (d) the extent to which Class Members
15 were damaged by the alleged conduct of Defendants; (e) the defenses asserted; (f)
16 the anticipated motions to be filed by Defendants; and (g) the benefit of obtaining a
17 settlement on the proposed terms now, as opposed to awaiting a potentially greater
18 settlement or judgment at some unknown time in the future.

19 94. Moreover, Class Counsel have demonstrated a high degree of
20 competence in the litigation of this case. With the benefit of extensive factual and
21 expert discovery and arduous motion practice, including class certification and
22 summary judgment, Class Counsel strongly believe that the Settlement is a fair,
23 adequate, and reasonable resolution of the Class' dispute with Defendants, and is
24 preferable to continued litigation and the costs and uncertainties associated
25 therewith. Accordingly, this factor weighs in favor of approval of the Settlement.
26

27
28

1 **7. The Settlement Enjoys Overwhelming Class Support**

2 95. The last criterion for final approval is the reaction of the Class.
 3 *See Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625
 4 (9th Cir. 1982). In any class action of significant size, the absence of any
 5 objections would be "extremely unusual." *See In re Anthracite Coal Antitrust*
 6 *Litigation*, 79 F.R.D. 707, 712-13 (M.D. Pa. 1978). *DIRECTV*, 221 F.R.D. at 529
 7 ("It is established that the absence of a large number of objections to a proposed
 8 class action settlement raises a strong presumption that the terms of a proposed
 9 class settlement action are favorable to the class members.").

10 96. The Settlement enjoys the overwhelming support of the Class.
 11 The Notice was delivered by first class U.S. mail to approximately 376,000 Class
 12 members. As of August , 2007, more than 52,000 claims have been filed. In
 13 contrast, only 54 Class Members have submitted Objections. The reaction from the
 14 Class warrants final approval of the Settlement. *See e.g., Boyd v. Cechtle Corp.*,
 15 485 F.Supp. 610, 624 (N.D. Cal. 1979) (objections from only 16 percent of the
 16 class was persuasive that the settlement was adequate).

17 **C. The Objections Are Overruled**

18 **(1) The Adequacy of the Settlement Does Not Depend on**
 19 **the Individual Desires of the Objecting Plaintiffs**

20 97. The Court rejects the arguments by four Objectors or groups of
 21 Objectors that the Settlement should not be approved because the Objecting
 22 Plaintiffs object to the terms of the Settlement. To the contrary, "agreement of the
 23 named plaintiffs is not essential to approval of a settlement which the trial court
 24 finds to be fair and reasonable." *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th
 25 Cir. 1982); *see also Lazy Oil Co v. Witco Co.*, 95 F. Supp. 2d 290, 334 (W.D. Pa.
 26 1997).

27 98. Multiple courts have approved class action settlements
 28 notwithstanding the objections of the class representatives. *See, e.g. Officers for*

1 *Justice*, 688 F.2d at 631; *Parker*, 667 F.2d at 1204 (affirmed the approval of a
 2 settlement of an employment discrimination class action over the objections of 10
 3 of the 11 named plaintiffs); *Maywalt v. Parker & Parsley Petroleum*, 864 F. Supp.
 4 1422 (S.D.N.Y. 1994), *aff'd* 67 F.3d 1072 (2d. Cir. 1995) (granting final approval
 5 of a securities fraud class action over some 2,700 objections, including certain of
 6 the class representatives).³ The rationale is that “[t]o empower the Class
 7 Representatives with what would amount to an automatic veto over the Proposed
 8 Settlement does not appear to serve the best interests of Rule 23 and would merely
 9 encourage strategic behavior ‘designed to maximize the value of the veto rather
 10 than the settlement value of the claims.’” *Maywalt*, 864 F. Supp. at 1430, quoting
 11 *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1366 (2d Cir. 1991).

12
 13 99. This Court is not required to give any special deference to the
 14 Objecting Plaintiffs. *See In re Airline Ticket*, 953 F. Supp. At 282 n.3 (considering
 15 but giving “no special deference based merely on [objector’s] status as a class
 16 representative” and approving settlement). The Representative Plaintiffs support
 17 approval of the Settlement.

18 **(2) The Risks Associated With The Clayton Act Section 7 Claim**
 19 **Weigh In Favor Of The Settlement**

20 **(i) Objectors Ignore the Hurdles Facing Plaintiffs at Trial**

21 100. Certain Objectors argue that the case against Defendants is too
 22 strong to settle. These Objectors, however, fail to provide the Court with any

23
 24 ³ *See also, Olden v. LaFarge Corp.*, 2007 U.S. Dist. LEXIS 5954 at *40-41 (E.D.
 25 Mich. 2007) (approving settlement without the support of any of the class
 26 representatives); *Lazy Oil*, 95 F. Supp. 2d. at 333-34 (approving settlement and noting
 27 that “agreement of the named plaintiffs is not essential to approval of a settlement
 28 which the trial court finds to be fair and reasonable”); *Boyd*, 485 F. Supp. at 624
 (approving consent decree in an employment discrimination class action, despite the
 fact that “[a]pproximately sixteen percent of the class, including three of the four
 named plaintiffs, have filed some opposition to the settlement”).

1 evidence or analysis. Their argument is based more on the unsubstantiated
2 optimism of Disner, than on the facts of the case and the risks associated with trial.

3 101. The Objecting Plaintiffs argue that the strength of the Section 7
4 claim weighs in favor of rejecting the Settlement against BAR/BRI, but not
5 Kaplan. Notwithstanding the impropriety of this request, the position is contrary to
6 the position that the Objecting Plaintiffs and Disner previously advocated in early
7 December 2006, when they all supported the monetary terms of the Settlement.
8 Moreover, it directly contradicts statements Disner made under oath in a
9 declaration filed with this Court on March 12, 2007. Furthermore, this Court finds
10 this argument is without merit.

11 102. The Objecting Plaintiffs urged the Court to approve Kaplan's
12 agreement to pay \$13 million of the Settlement and its release from the Action, but
13 urge the Court to reject the remainder of the Settlement (involving BAR/BRI). The
14 Settlement Agreement does not specify how much either Defendant is paying; nor
15 does it allow for the Court to approve parts of the Settlement, while disapproving
16 others. The Settlement "must stand or fall in its entirety." *Hanlon*, 150 F.3d at
17 1026 ("Neither the district court nor this court ha[s] the ability to delete, modify or
18 substitute certain provisions"). In *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986), the
19 Supreme Court noted that a district court is only permitted to "accept the proposal,
20 reject it and postpone the trial date to see if a different settlement can be achieved,
21 or reject it and try the case." Since the Settlement as a whole is fair, reasonable and
22 adequate, it is approved in its entirety.

23 103. As with the Sherman Act claims, Class Counsel thoroughly
24 considered the strengths of the Section 7 claim and concluded that Plaintiffs faced
25 many hurdles, including:

26 (a) Application of the four-year statute of limitations
27 and/or the doctrine of laches, possibly defeating or diminishing the claim all
28

1 together and certainly dividing the Class as currently defined. *See Midwestern*
2 *Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004);
3 *California v. American Stores Co.*, 495 U.S. 271, 297 (1989) (J. Kennedy,
4 concurring).⁴

5 (b) Establishing product and geographic market definitions,
6 which requires a more detailed analysis than that needed for the other claims. *See*
7 *U.S. v. Continental Can Co.*, 378 U.S. 441, 459 (1964).⁵

8 (c) Establishing that BAR/BRI acquired West Bar in light of
9 BAR/BRI's contention that BAR/BRI did not purchase West bar's stock, assets or
10 student contracts and that West Bar was already out of business at the time that
11 BAR/BRI agreed to provide bar review courses to former West Bar students and
12 only incidentally acquired certain limited intellectual property from West Bar;

13 (d) Establishing the requisite causal link between BAR/BRI's
14 acquisition of certain limited intellectual property from West Bar, which had gone
15 out of business and was no longer a competitor, and the claimed damages;

16 (e) Defeating the "failing company" doctrine defense, which
17 would, at the very least, require a "battle of the experts" to resolve;

18 (f) Overcoming a dearth of precedent on the issue of the
19 divestiture remedy; and

20 (g) Overcoming the fact that no private *consumer* class action
21 has ever resulted in a divestiture remedy.

22 _____
23
24 ⁴ Class Members from 1997 through 2001 who previously relied on tolling
25 principles available for their Sherman Act claims (*i.e.* fraudulent concealment,
26 continuing violation, etc.) would recover nothing, even in the event of a total
27 victory, because these tolling provisions are not available with respect to the
Section 7 claim.

28 ⁵ This Court has not conducted this analysis regarding Plaintiffs' product or
geographic market definitions for a Section 7 claim.

1 104. As the Supreme Court said when it authorized private suits in
2 1989, “Dissolution could be considerably more awesome... [D]issolution was a
3 judgment ... of corporate death, which represented the extreme rigor of the law.”
4 *California v. American Stores*, 495 U.S. at 289, quoting *People v. North River*
5 *Sugar Refining Co.*, 121 N.Y. 582, 608 (1890). Even if divestiture was
6 appropriate, it would not necessarily be fashioned in terms of splitting up
7 BAR/BRI. Since BAR/BRI’s purchase of West Bar’s assets was limited to some
8 intellectual property, divestiture might only mean requiring BAR/BRI to give up
9 intellectual property rights to materials that are ten years old. In addition, there
10 remained a risk that the claims against BAR/BRI, including the Section 7 claim,
11 would be decided adversely on summary judgment.

12 105. Given these hurdles a substantial cash settlement coupled with
13 significant additional relief, including termination of the very agreement which was
14 the catalyst of the lawsuit, is fair, adequate, reasonable, and in the best interest of
15 the Class.

16 **(ii) The Bifurcation Motion Is Improper, Lacks Merit and is**
17 **Denied**

18 106. Bifurcating the Section 7 claim from the Sherman Act claims, as
19 requested by the Objecting Plaintiffs, would create further obstacles and be a waste
20 of time and resources. Not only is the “conditional motion” for bifurcation
21 premature and improper (as the motion before the Court is for final approval of a
22 Settlement, which, if granted, moots any such motion), it defies logic.

23 107. Courts have discretion to order a separate trial of any claim “in
24 furtherance of convenience or to avoid prejudice, or when separate trials will be
25 conducive to expedition and economy.” Fed.R.Civ.P. 42(b); *Hayden v. Chalfant*
26 *Press, Inc.*, 281 F.2d 543, 544 (9th Cir. 1960). “It is the interest of efficient
27 judicial administration that is to be controlling under the rule, rather than the
28

1 wishes of the parties.” Wright & Miller, Federal Practice and Procedure, § 2388
2 (2d ed. pkt part 2006). The moving party has the “burden of proving that the
3 bifurcation will promote judicial economy and avoid inconvenience or prejudice to
4 the parties.” *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101
5 (N.D. Cal. 1992); *see also Ebay, Inc. v. Bidder's Edge, Inc.*, 2000-2 Trade Cases P
6 73,039, 56 U.S.P.Q.2d 1856 *4 (C.D. Cal. July 25, 2000); *Burton v. Mountain West*
7 *Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598 (D. Mont. 2003).

8
9 108. That burden cannot be met as bifurcation belies judicial
10 economy here. The Objecting Plaintiffs concede that “the only difference between
11 the Section 7 and Sherman Act claims is the damages.” Furthermore, the proposal
12 to try the Section 7 claim first, even if granted, may recover damages for Class
13 Members only in the four years before the filing of the Initial Complaint. Class
14 Members from 1997 through 2001 who previously relied on tolling principles
15 available for their Sherman Act claims (*i.e.* fraudulent concealment, continuing
16 violation, etc.) could recover nothing, even in the event of a total victory, because
17 the application of those tolling provisions to a Section 7 claim is uncertain. To
18 recover anything for these Class Members, the Sherman Act claims would still
19 need to be tried and proven, requiring use of largely the same evidence and
20 witnesses, regardless of the result of the Section 7 claim. This would result in a
21 duplication of time and effort that squanders judicial resources. The rules do not
22 permit a plaintiff to try causes of action *seriatim*, starting with whatever claim it
23 may think is strongest. *See, e.g., In re Bendectin Litigation*, 857 F.2d 290, 307 (6th
24 Cir. 1988) (“The piecemeal trial of separate issues in a single suit is not to be the
25 usual course”).
26
27
28

1 **(3) The \$49 Million Settlement Fund is Fair, Reasonable and**
 2 **Adequate in Light of the Strengths and Weakness in**
 3 **Plaintiffs' Case**

4 109. Nine Class Members, as well as the Objecting Plaintiffs, argue
 5 that the \$49 million is inadequate or that their individual shares will be insufficient.
 6 None of these Objectors, however, provide the Court with any cogent analysis or
 7 evidence showing that the \$49 million is inadequate.

8 110. Plaintiffs' experts estimated damages for all claims as being in
 9 the range of \$158 million to \$168 million. Defendants' expert opined that the
 10 Class suffered no damages with respect to both the Section 2 claim under the
 11 Sherman Act and the Section 7 claim under the Clayton Act, and, at most, suffered
 12 damages of \$7 million with respect to the Section 1 claim under the Sherman Act.
 13 Thus, the \$49 million represents approximately 30% of Plaintiffs' expert's
 14 estimated damages, and 700% of Defendants' expert's estimated damages.⁶

15 111. When evaluated against other settlements approved, the \$49
 16 million is fair, reasonable and adequate. *See In re Cendant Corp. Litig.*, 264 F.3d
 17 at 241 (noting that recoveries can range from 1.6% to 14% and affirming settlement
 18 representing 36% of recovery); *Newman v. Stein*, 464 F.2d 689 (2d Cir.1972)
 19 (approving settlement representing 14% of potential recovery); *Nichols v.*
 20 *Smithkilne Beecham Corp*, No. Civ. A.00-6222, 2005 WL 950616 at *16
 21 (approving settlement that represented between 9.3% and 13.0% of claimed
 22 damages); *see also Phemister v. Harcourt Brace Jovanovich*, No. 77 C 39, 1984
 23 WL 21981 at *11 (N.D. Ill. September 14, 1984) ("Many antitrust settlements that
 24

25
 26 ⁶ One Objector argues that the Settlement "smells of collusion" because Disner
 27 believes that the damages are up to ten times more than the Settlement Fund. There
 28 is absolutely no evidence in the record showing any signs of collusion. To the
 contrary, the record, including the declaration of the Honorable Daniel Weinstein,
 shows that the settlement negotiations were hard-fought at all times.

1 achieve substantially less than single damages for the class are considered fair and
2 adequate settlements”).

3 **(4) Courts Do Not Evaluate Settlements in Light of the Treble**
4 **Damages That Might Be Available After a Successful Trial.**

5 112. The Court rejects the Objecting Plaintiffs' argument that the
6 monetary portion of the Settlement is inadequate because the Section 7 claim is
7 worth \$360 million. Objecting Plaintiffs arrive at this figure by trebling Plaintiffs'
8 expert's estimated damages of \$146 million since 2001 and then multiplying that
9 figure by their estimated chances of winning at trial.

10 113. This analysis is flawed as it presupposes that Plaintiffs will
11 succeed at trial. Evaluating the Settlement in light of the treble damages available
12 at the end of a successful trial is purely speculative. Courts do not consider such
13 damages when calculating a reasonable range of recovery. *See e.g., City of Detroit*
14 *v. Grinnel Corp.*, 495 F.2d 448, 458 (2d Cir. 1974) (“[T]he vast majority of courts
15 which have approved settlements in this type of case . . . have given their approval
16 to settlements which are traditionally based on an estimate of single damages
17 only”); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH,
18 2005 WL 30098808 at *9 (D. N.J. Nov. 9, 2005) (“[i]n order to evaluate the
19 propriety of an antitrust class action settlement's monetary component, a court
20 should compare the settlement to the estimated single damages”); *In re Warfarin*,
21 212 F.R.D. 231, 257 (D. Del. 2002) (citing *In re Lorazepam & Clorazepate*
22 *Antitrust Litig.*, 205 F.R.D. 369, 376 (D.D.C. 2002). None of the Objectors has
23 cited any authority to the contrary.

24 **(5) Defendants' Ability to Pay More Is Irrelevant**

25 114. The Court rejects the argument by certain Objectors that since
26 BAR/BRI is profitable and therefore has the ability to pay more, the \$49 million
27 Settlement is inadequate. Courts have repeatedly rejected this argument. *See In re*
28

1 *Nasdaq*, 187 F.R.D. at 478 (stating that the defendants' ability to pay a very
2 substantial judgment does not militate against settlement); *In re PaineWebber Ltd.*
3 *Partnerships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("the fact that a
4 defendant is able to pay more than it offers in settlement does not, standing alone,
5 indicate that the settlement is unreasonable or inadequate").

6 **(6) The Amount Sought In the FAC Is Immaterial**

7
8 115. The Court rejects the argument by two groups of Objectors that
9 the \$49 million Settlement Fund is inadequate because it is substantially less than
10 the amount sought in the FAC (\$900 million). The amount sought in the FAC,
11 however, was based on the recovery of treble damages before discovery was taken
12 and before Plaintiffs' experts provided an estimate of the damages. The Court
13 considers the \$49 million Settlement Fund in light of the time of settlement.

14 **(7) The Present Value of a BAR/BRI Course Is Irrelevant**

15
16 116. The Court rejects the argument by one Objector that the \$49
17 million Settlement Fund is inadequate because Class Members will only get a
18 pro-rata share of \$145.70, which he claims is equivalent to 5% of the present value
19 of his course (\$2700). The present value of a BAR/BRI course has nothing to do
20 with the amount of alleged overcharges to the Class. Further, the amount each
21 Class Member will receive under the Settlement depends on the number of Class
22 Members who file valid Claim Forms, among other things, as set forth in the Plan
23 of Allocation.

24 **(8) The Objectors Miscalculate the Risks Going Forward**

25
26 117. The Court rejects the argument by certain of the Objectors that
27 the \$49 million Settlement Fund is inadequate because of the limited risk in the
28 Action. For instance, they argue that there is a low risk of decertification and that

1 future costs are limited because discovery is complete. These conclusory
 2 Objections, however, ignore the myriad of risks identified and discussed at length
 3 by Settling Plaintiffs, including the further costs of going to trial and the risks
 4 associated with establishing damages.

5 **(9) The Lack of Provisions Prohibiting Future Misconduct or**
 6 **Dissolution Do Not Render the Settlement Inadequate**

7
 8 118. The Court rejects the argument by certain Objectors that the
 9 non-monetary relief is either illusory or insufficient because it does not prohibit
 10 Defendants from engaging in anticompetitive or unlawful conduct in the future.
 11 Courts are reluctant to sustain such objections, finding that the “best assurance
 12 against future antitrust violations by defendants is the persistent threat of litigation
 13 by any class member.” *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 337
 14 (N.D. Ga. 1993) (approving settlement as fair, reasonable and adequate despite the
 15 absence of injunctive relief prohibiting the defendant from engaging in future
 16 misconduct).

17 119. The Settlement requires Defendants to terminate the agreement
 18 Plaintiffs allege is unlawful.⁷ BAR/BRI is also required to provide a clear
 19 statement to initial enrollees that they are not contractually obligated to pay the full
 20 amount for a BAR/BRI course should they choose not to take such a course upon
 21 graduation from law school. Since many law students enter into a contract with
 22 BAR/BRI in their first year of law school, Plaintiffs have argued that the obligation
 23 to pay the full amount for the course serves as a powerful hold on these students,
 24

25
 26 ⁷ At least one Objector incorrectly argues that Plaintiffs accomplished nothing sought
 27 in the Action. Plaintiffs achieved termination of the alleged non-competitive
 28 agreement which was the catalyst of this Action. That Plaintiffs did not obtain
 everything sought in the FAC does not render the Settlement inadequate, as settlement
 is about compromise.

1 thereby locking-up a substantial portion of the market for a three-year period.⁸
 2 Thus, this provision removes a significant barrier to entry into the market by
 3 competitors, who would otherwise face the potentially overwhelming obstacle of
 4 trying to compete in a market with few available customers for several years after
 5 entry. Furthermore, BAR/BRI has stated that it is committed to accurate
 6 advertising as required by the Lanham Act, the Federal Trade Commission Act, and
 7 similar laws. Settlement Agreement at ¶¶ 38(a) and 39.

8 **(i) Dissolution Does Not Benefit the Class**

9
 10 120. Other Objectors criticize the Settlement because it does not
 11 provide for the break-up of BAR/BRI. According to the Objecting Plaintiffs, “a
 12 significant number of class members are directly interested in the future” of the bar
 13 review industry and that BAR/BRI would be broken up if Plaintiffs instead went to
 14 trial and prevailed on the Section 7 claim.

15 121. First, a significant number of Class Members are in favor of the
 16 Settlement and have not filed any Objections on the ground that there are no
 17 provisions for dissolution.

18 122. Second, there are no guarantees that Plaintiffs would prevail at
 19 trial and obtain an order breaking-up BAR/BRI, as even Disner has acknowledged.
 20 Even if Plaintiffs did prevail at trial, any verdict in their favor, including
 21 divestiture, would be subject to appeal thereby delaying any recovery to the Class.
 22 This is especially true here, where the Objecting Plaintiffs concede the complexity
 23 of Section 7 and the dearth of relevant authority applying or interpreting that
 24 section in private consumer class action cases.

25
 26 ⁸ The argument that this provision is “practically self-defeating” because BAR/BRI
 27 can rescind the statement on five days notice to Class Counsel is inaccurate. To
 28 rescind the statement, BAR/BRI must apply to the Court on five days notice to Class
 Counsel and establish “good cause.” See Settlement Agreement at ¶ 38(b).

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(ii) Class Counsel Cannot Ensure Competition In the Bar Review Market Through the Settlement

123. The Court rejects arguments by other Objectors that the Settlement does not encourage competitors into the market, require BAR/BRI to lower its prices, or require Defendants to enter each other's market.

124. Class Counsel cannot force competitors to enter the market through the Settlement.

(10) The Scope And Contents of the Release Are Proper

125. The Court rejects arguments by Objectors that "settling defendants are buying immunity from all claims, including those not alleged in the complaint. If the settlement proponents seek a broad release, class members should be more adequately compensated." This argument, too, ignores the actual terms of the Settlement Agreement. The Release expressly preserves the claims in the New York Actions. *See* Settlement Agreement ¶58.

126. While the Release includes "all manner of claims . . . concerning or relating to any conduct alleged in the Complaint in this Action, and including without limitation all claims that have been asserted or could have been asserted in any litigation," this language is typical and has been approved by many courts, including the Ninth Circuit. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1284, 1287-88 (9th Cir. 1992) (noting that the weight of authority holds that federal courts may release claims which are not in the complaint provided they are based on the "same factual predicate"); *In re Prudential Ins. Co. America Sales Practice Litig.*, 148 F.3d at 326 (finding it reasonable for release to include "other claims" and stating that "releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case").

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(11) The Possibility of a Cap and a Cy Pres Award Are Proper

127. The Court rejects the argument of certain Objectors that the possibility of a cap on individual recovery resulting in a *cy pres* award should defeat approval of the Settlement. Those provisions do not render the Settlement inadequate.

128. The Maximum Payment was a heavily negotiated term of the Settlement. Because the Net Settlement Fund is to be distributed *pro rata* among the Class Members who make a valid claim, the Maximum Payment prevents a small group from receiving a multi-million dollar windfall. This 30% Maximum Payment coincides with Plaintiffs' expert's estimate that the average overcharge resulting from Defendants' alleged conduct was approximately 30% nationwide.

129. The Maximum Payment does not create any benefit for Defendants as they will not receive any money back if the Maximum Payment and *cy pres* award are implicated. In that event, this Court would determine the recipient of any *cy pres* award of the undistributed funds.

(12) A Second Opt-Out Period Is Not Required

130. In granting the Preliminary Approval Order, the Court found that an additional opt-out period was unnecessary.

131. A second opt-out is not required. *See Officers for Justice*, 688 F.2d at 635 (citations omitted); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d at 518.

(13) The Sealed Record Does Not Impact Approval of the Settlement

132. The Court rejects the argument by certain Objectors that final approval of the Settlement should be delayed and/or denied on the ground that the

1 Class was purportedly denied access to the pleadings filed under seal pursuant to a
2 protective order entered by the Court on January 13, 2006 (the "Protective Order").
3 These Objections are moot, untimely, and more importantly, ignore the crucial role
4 served by the Court in the class action settlement approval process.

5
6 133. These Objections are overcome by the safeguards of the three
7 step class action settlement approval procedure being utilized here -- preliminary
8 approval, dissemination of notice, and a fairness hearing. This procedure,
9 commonly employed by federal courts and endorsed by leading class action
10 commentators, serves the dual function of safeguarding class members' due
11 process rights and enabling the court to fulfill its role as the guardian of class
12 members' interests. *See Newberg* at § 11.25, quoting *Manual for Complex*
13 *Litigation* (Third) § 30.41 (1995).

14 134. These Objections disregard the fact that, in its role as guardian
15 for the Class, this Court has had access to all of the pleadings filed by the parties,
16 including those under seal pursuant to the Protective Order. The Court's access to
17 and review of these documents throughout the pendency of this Action precludes
18 any contention that this Court is incapable of assessing the fairness, adequacy and
19 reasonableness of the Settlement. To the contrary, this Court is intimately familiar
20 with facts and legal theories this matter.

21 135. The Objections based upon the inaccessibility of documents are
22 untimely. Class Members received notice of the Settlement in early April 2007,
23 and could have acted earlier to obtain access to the materials. Instead, they waited
24 five weeks, until the Objections were due, to request a continuance of the Final
25 Settlement Hearing to permit a review the sealed documents, or in the alternative, a
26 rejection of the Settlement. Such a tactic is inherently suspect and prejudicial to
27 the Class Members who have voiced their approval of the Settlement.

28

1 requires a very general description of the proposed settlement in the settlement
2 notice, which is satisfied here. *See Churchill Village, L.L.C.*, 361 F.3d at 575;
3 *Torrise*, 8 F.3d at 1374.

4 **(16) Class Counsel Has Fulfilled Its Fiduciary Obligation to the**
5 **Class as a Whole and is Adequate Under Fed. R. Civ. P. 23**

6
7 142. The Court rejects the argument by one Objector that Class
8 Counsel are inadequate due to a “rift” within McGuireWoods LLP (one of three
9 Class Counsel), allegedly because “one of the partners, Eliot Disner, has filed a
10 brief objecting to the proposed settlement....” This is inaccurate. The record is
11 undisputed that in December of 2006, after significant consideration, all Class
12 Counsel working on the case (including Disner) agreed that the Settlement was
13 fair, adequate and reasonable. The brief in question was filed by the Objecting
14 Plaintiffs without the authorization of Class Counsel. *See* Docket No. 281.
15 Moreover, Disner initially agreed to the Settlement and supported it at the
16 Preliminary Approval hearing. The viability of the theories espoused in the
17 unauthorized filing by the Objecting Plaintiffs were thoroughly considered by
18 Class Counsel prior to entering the Settlement, with the ultimate decision by Class
19 Counsel as a whole (including Disner) that the Settlement was fair, adequate and
20 reasonable. Therefore, this Court finds that Disner's subsequent reversal of
21 position and departure from McGuire Woods LLP is immaterial to this Court's
22 consideration of the fairness, reasonability, and adequacy of the Settlement.

23 143. Class Counsel has fulfilled its fiduciary duty to the Class as a
24 whole, and the unauthorized filing by the Objecting Plaintiffs does not change that.
25 The primary responsibility of class counsel is to represent the entire class as it
26 believes appropriate. *See* Advisory Committee Note, Fed. R. Civ. P. 23(g)
27 (“Paragraph (1) . . . articulates the obligation of class counsel to represent the
28

1 interests of the class, as opposed to the potentially conflicting interests of
2 individual class members.”); *see also Newberg* at § 11.65 (“The general rule is that
3 the named plaintiff and counsel bringing the action stand as fiduciaries for the
4 entire class, commencing with the filing of a class complaint.”); *Greenfield v.*
5 *Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (“[C]lass action counsel
6 possess, in a very real sense, fiduciary obligations to those not before the court.”).

7
8 144. Class counsel must make their own determinations about the
9 appropriate course of action, taking full account of their fiduciary obligation to the
10 class as a whole. *See Olden supra*, 472 F. Supp. 2d at 939; *In re “Agent Orange”*
11 *Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986); *Lazy Oil Co.*, 166 F.3d at
12 590.

13 145. It is for this Court to determine what is in the best interests of
14 the Class after evaluating all arguments in favor of and against the Settlement.
15 Class Counsel have conducted themselves throughout this case to aid the Court in
16 this evaluation by performing its fiduciary duties to the Class, and are therefore
17 adequate under Fed. R. Civ. P. 23.

18 **IX. FAIRNESS OF PLAN OF ALLOCATION**

19 146. “As with settlement agreements, courts consider whether
20 distribution plans are fair, reasonable, and adequate.” *Lorazepam & Clorazepate*,
21 205 F.R.D. at 381; *see also City of Seattle*, 955 F.2d at 1284; *In re Citric Acid*
22 *Antitrust Litigation*, 145 F. Supp.2d 1152, 1154 (N.D. Cal. 2001); *Vitamins*
23 *Antitrust Litig.*, No. 99197, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000). “[I]n
24 evaluating the formula for apportioning the settlement fund, the Court keeps in
25 mind that district courts enjoy broad supervisory powers over the administration of
26 class-action settlements to allocate the proceeds among the claiming class members
27 equitably.” *Hammon v Barry*, 752 F. Supp. 1087, 1095 (D. D.C. 1990) (internal
28

1 quotations and citations omitted); accord *In re "Agent Orange" Prod. Liab. Litig.*,
2 818 F.2d 179, 181 (2d Cir. 1987).

3 147. The Plan of Allocation was prepared by Class Counsel and
4 Defendants' Counsel in such a way as to fairly allocate the recovery among Class
5 Members in accordance with Plaintiffs' theories of potential damages in the Action.

6 148. Finally, in addition to the input of the experts referred to above,
7 the Plan of Allocation was adopted only after significant arm's length discussions
8 among Class Counsel and Defendants' counsel.

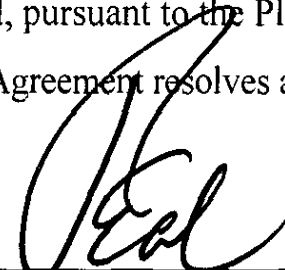
9 149. For the reasons set out above, this Court finds that the Plan of
10 Allocation is fair and reasonable.

11 **X. CONCLUSION**

12 150. The Settlement Agreement is comprehensive in its scope, is fair
13 and even-handed in its application, and is of substantial economic benefit to the
14 Class. The Court therefore approves the Settlement Agreement as fair, adequate and
15 reasonable.

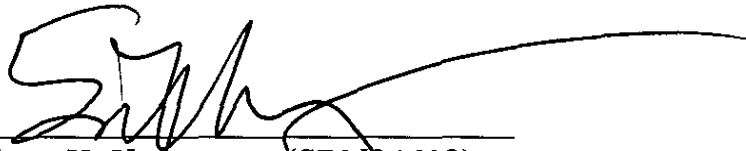
16 151. The Court finds that it is in the best interests of Class Members
17 that the Net Settlement Fund be disbursed, pursuant to the Plan of Allocation as
18 soon as possible, and that the Settlement Agreement resolves all claims in the Action
19 as to the Defendants.

20
21 DATED: Aug 10, 2007

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23 _____
24 Honorable Manuel L. Real
25 United States District Court Judge
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09/10/2007

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1800 Century Park East, 8th Floor, Los Angeles, California 90067.

On August 20, 2007, I served the following document(s) described as **[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices. (C.C.P. § 1013 (a) and 1013a(3))

BY FACSIMILE: At approximately _____, I caused said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was (310) 315-8210. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.

BY OVERNIGHT DELIVERY: I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

BY HAND DELIVERY: I delivered such envelope(s) by hand to the office of the addressee(s). (C.C.P. § 1011(a)(b))

BY PERSONAL SERVICE: I personally delivered such envelope(s) to the addressee(s). (C.C.P. § 1011)

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 20, 2007, at Los Angeles, California.



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