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10 Brown McElroy, Daniel Schafer,
11 Jason Tingle and David Oriol

12 Additional Counsel listed on Signature Page

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 RYAN RODRIGUEZ, et al. on behalf of
16 themselves and all persons similarly
17 situated,

18 Plaintiffs,

19 vs.

20 WEST PUBLISHING CORPORATION,
21 et al.,

22 Defendants.

Case No. CV 05-3222 R(Mcx)

CERTAIN OBJECTORS' JOINT
SURREPLY IN OPPOSITION
TO CLASS COUNSEL'S REQUEST
FOR ATTORNEY FEES

Date: November 2, 2009
Time: 10:00am
Courtroom: 8

Judge: Hon. Manuel J. Real

23 AND CONSOLIDATED ACTIONS

24 CERTAIN OBJECTORS' JOINT SURREPLY IN OPPOSITION
25 TO CLASS COUNSEL'S REQUEST FOR ATTORNEY FEES

26 COME NOW Evans & Mullinix, P.A., Sarah Siegel, Jennifer Brown McElroy,
27 Daniel Schafer, Jason Tingle and David Oriol (together, "Objectors Evans, Siegel,
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1 Brown, Schafer, Tingle and Oriol") and hereby respond in opposition to Settling Class
2 Plaintiffs' Reply, filed October 26, 2009 (Document 598,) in Further Support of a request
3 for attorney's fees, and these certain Objectors further supplement their Joint Response¹,
4 filed October 19, 2009 (Document 593,) in Opposition to Class Counsel's Request, filed
5 October 9, 2009 (Document 583,) for Approval and Distribution of Attorneys' Fees,
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7 stating as follows.
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10 **Class Counsel's Conflict of Interest Precludes a Fee Award.**

11 The conflict of interest which was identified for this Court by certain Objectors,
12 described in this Court's Order of September 10, 2007 approving the Settlement, and
13 criticized in the Ninth Circuit's opinion on April 23, 2009², is an ethical violation which
14 precludes Class Counsel from receiving a fee. *Cal Pak Delivery, Inc. v. United Parcel*
15 *Service, Inc.*, 52 Cal.App.4th 1, 14 (1997)("It is the general rule in conflict of interest
16 cases that where an attorney violates his or her ethical duties to the client, the attorney is
17 not entitled to a fee for his or her services.") *But see, Mardirossian v. Ersoff*, 153
18 Ca.App.4th (2007); *Pringle v. LaChappelle*, 73 Cal.App. 4th 1000 (1999).
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27 ¹Settling Class Plaintiffs' Reply, at p. 1, n.1, omits -- presumably by inadvertence -- these Objectors' Opposition,
28 filed October 29, 2009 (Document 593) from the list of four opposition briefs filed by other objectors.

²[T]he ex ante incentive agreements created conflicts among the five contracting class representatives, their
counsel and the rest of the class. We disapprove of them." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948,
955 (9th Cir. 2009).

1 **Lodestar is Excessive, and Records are Incomplete.**

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3 As a percentage of the fund, the claimed lodestar, \$8,873,518, pushes the upper
4 limits of reasonableness for a fund of the size in this case. Nevertheless, even though a
5 fee in the amount of the lodestar might survive a percentage-of-fund cross check, the
6 lodestar is so excessive that any fee award must be far less than that figure. The lodestar
7 figure is particularly suspect in that the fee request is not accompanied by sufficient
8 underlying data, that is, it has inadequate time entries, subtotals, and indications of who
9 worked. It shows total numbers of hours for the various law firms, thereby depriving the
10 Court (and the public, Class Members, and Objectors) the opportunity to make a fair
11 evaluation of the reasonableness of the fee. This Court should at least be informed of
12 how much time was incurred BEFORE the inexcusable conflict of interest arose (which
13 arguably is compensable) and how much was incurred after such time, for which
14 compensation should not be awarded.
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19 **Fee Request Urges This Court to Ignore and Violate Appeals Court Mandate.**

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21 The Ninth Circuit's directive is clear: "On remand, we expect the district court to
22 revisit all aspects of the award to class counsel." *Rodriguez v. West Publishing Corp.*,
23 563 F.3d at 968. Nevertheless, the fee request seeks a new Order which merely adopts
24 and repeats the Order which was reversed on appeal. In complying with the mandate,
25 this Court must revisit the number of hours claimed, the hourly rate, the allocation of
26 work among support staff, associates and partners, the amount of time spent on seeking
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1 fees, the comparison to the funds value, and the overall reasonableness of the fee request
2 -- particularly in light of the ethical lapses which the appeals court recognized.
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4 Unfortunately, fulfilling this obligation will require this Court to reverse a position it
5 already has taken on the record, wherein the Court declined the opportunity to order
6 production of these necessary records. See Transcript of June 15, 2009 hearing, page 7,
7 lines 16-22 (Document No. 560). Timesheets are particularly essential in this instance
8 because of the conflict of interest which was criticized by the Ninth Circuit. Fees for
9 work done prior to development of the conflict arguably could be compensable but, as
10 described above, fees applying for time after the conflict appeared are not compensable.
11 Substantiation of the bare claims for fees also is necessary simply because the party
12 seeking a fee has the burden of proving it is reasonable. *In re Washington Public Power*
13 *Supply Sys. Lit.*, 19 F.3d 1291, 1306 (9th Cir. 1994). The only conclusion that can be
14 reached is that the request for a fee, if any, is not reasonable and is not supported by the
15 record before the Court.
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21 **Reliance on the Fund's Size is Misplaced.**

22 The unacceptable conflict of interest also bears on the attorneys fee to the extent its
23 reasonableness would be measured by comparison to the size of the fund. Certainly the
24 conflict of interest was absent for some named Class Members and their counsel.
25 However, other named Class Members had an obvious reason to accept a settlement
26 which would protect a few thousand dollars of their possible incentive award, even at the
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1 expense of millions of dollars in settlement benefits for the Class Members whom the
2 representatives were duty bound to protect. Inasmuch as this was a RICO action, which
3 would permit treble damages, the effect on the settlement is more than theoretical; it's
4 real, substantial and significant. The Ninth Circuit found the conflict sufficiently
5 harmless to permit approval of the settlement -- which involves merely a finding that it is
6 fair, reasonable and adequate, not that the fund was as large as it could have and should
7 have been. Accordingly, to find fees reasonable in light of the size of the settlement is
8 misplaced. The issue is what amount of fee would be reasonable if the Settlement Fund
9 were as large as it would have been without the impermissible conflict of interest.
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14 WHEREFORE Objectors Evans, Siegel, Brown, Schafer, Tingle and Oriol hereby
15 respectfully request that this Court, upon revisiting all aspects of the fee application, the
16 conflict of interest, and lack of documentation, reject the Class Counsel's fee request
17 entirely but, if a fee nevertheless is awarded, it must not exceed the claimed lodestar of
18 \$8,873,518.
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21 Dated: October 29, 2009

/s/ Darrell Palmer

22
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the USDC CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants: see attached service list.

_____/s/ Darrell Palmer_____

Darrell Palmer

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