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9 *Attorneys for Plaintiff-Objectors,*  
Aaron Lukoff, John Prendergast, and David Orange  
10

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13

14 RYAN RODRIGUEZ, REENA B.  
15 FRAILICH, LOREDANA NESCI,  
16 JENNIFER BRAZEAL, and LISA  
17 GINTZ, on behalf of themselves and all  
others similarly situated,

18 Plaintiffs,

19 v.  
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21 WEST PUBLISHING CORP., a  
Minnesota corp. d/b/a BAR/BRI, and  
22 KAPLAN, INC., a Delaware corp.,  
23

24 Defendants.  
25

26 AND CONSOLIDATED ACTION  
27  
28

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

**OPPOSITION TO MOTION FOR  
DISTRIBUTION OF NET  
SETTLEMENT FUND**

Date: November 2, 2009

Time: 10:00 a.m.

Courtroom: 8

Judge: Hon. Manuel L. Real

1 Plaintiff-Objectors Aaron Lukoff, John Prendergast, and David Orange  
2 respectfully submit their Opposition to class counsel’s Motion for Distribution of  
3 Net Settlement Fund as follows.

4 **I.**

5 **INTRODUCTION**

6 On May 15, 2009, the Ninth Circuit Court of Appeals issued a Mandate in  
7 this case remanding for this Court “to consider in the first instance the effect, if  
8 any, of the conflict arising out of the incentive agreements on the request by class  
9 counsel for an attorney’s fee award,” and, “to revisit all aspects of the award to  
10 class counsel.” *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 968 (9th Cir.  
11 2009).

12 The Ninth Circuit remanded the case because it was “apparent” that class  
13 counsel had violated California ethical rules by, at a minimum, failing to disclose  
14 its incentive agreements with class representatives, and that it had a conflict of  
15 interest in its representation of the class: “the conflict of interest inhering in the  
16 incentive agreements did not just happen, nor was it a conflict that developed  
17 beyond the control or perception of class counsel. It was inserted into the retainer  
18 agreement.” *Id.*

19 Seemingly oblivious to the Ninth Circuit’s admonitions, class counsel now  
20 implores the Court to release its \$12 million bounty from the settlement fund,  
21 regardless of its gross and egregious conflicts of interest—conflicts of interest  
22 which, under California law, ***potentially bar recovery of attorneys’ fees***  
23 ***altogether***. Class counsel’s request is improper because it is excessive and  
24 unsupported, and meritless because it does not meaningfully address the Ninth  
25 Circuit’s concerns. As explained below, class counsel’s Motion to distribute the  
26 settlement fund is properly denied.

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## II.

ARGUMENTA. Class Counsel's Actual Conflict of Interest is a Serious Violation of Ethical Rules Requiring Fee Forfeiture

In its Motion, class counsel attempts to minimize its ethical lapses by claiming that fees are forfeited under the ethical rules, “only” if there is actual harm to the client. Class counsel cites no authority for this proposition, which is wholly incompatible with the general rule in conflict of interest cases. *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, 52 Cal.App.4th 1, 14 (1997) (“It is the general rule in conflict of interest cases that where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services.”).

Instead, it relies on *Pringle v. La Chapelle*, 73 Cal.App.4th 1000 (1999), which actually holds that “[counsel’s] acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties” will result in forfeiture of fees. *Pringle, supra*, at 1006, quoting *Clark v. Millsap*, 197 Cal. 765, 785 (1927).

The remainder of class counsel’s citations to authority are disingenuous and do not support the proposition that class counsel urges. Class counsel’s reliance on *Sullivan v. Dorsa*, 128 Cal.App.4th 947 (2005), is particularly misplaced, as that case involved a disputed fee awarded by the trial court to law firms appointed to represent a referee, not as counsel for a party. *Sullivan, supra*, at 964. In addition, *Slovensky v. Friedman*, 142 Cal.App.4th 1518 (2006), is inapposite because the holding is expressly based on the plaintiff’s failure to meet the elements of a legal malpractice claim. *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal.App.4th 257 (2007), does not apply because the court there found only a potential—not an actual—conflict of interest. Finally, the holding in *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal.4th 23 (2006), has nothing to do with

1 violations of the ethical rules implicated here, but rather whether the plaintiff was  
2 entitled to disgorgement of fees under California Corporations Code section  
3 13406. *Frye, supra*, at 48.

4       Instead, this case is closely analogous to *Image Technical Service, Inc. v.*  
5 *Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998), cited by the Ninth Circuit.  
6 Here, there is an actual and persistent conflict of interest between class members  
7 and representatives created by the incentive provisions of the retainer agreements  
8 with class representatives. This is not a theoretical conflict, nor is it some  
9 harmless or inadvertent error. Class counsel took affirmative acts to bring about  
10 the conflict, did not disclose it to the class, and did not seek a conflict waiver.  
11 While the nature of the conflict may be mitigated in some respects because this is  
12 a class action, that fact does not provide *carte blanche* for class counsel to violate  
13 ethical rules. Instead, class counsel's violations of California Rules of  
14 Professional Responsibility, Rule 3-310, invariably lead to the conclusion that it  
15 has forfeited its rights to fees, if not in whole, at least in substantial part.

16       **B. The Fee Award Requested by Class Counsel is Excessive**

17       Even if class counsel is entitled to fees, the purported lodestar calculations  
18 are inappropriate. First, here are no contemporaneous accountings of time  
19 provided in support of the lodestar calculations. All other counsel merely  
20 provided a number of hours and that attorney's rate. Without this information,  
21 class members cannot be assured that the attorneys' fees requested were based on  
22 "the number of hours the prevailing party *reasonably* expended on the litigation"  
23 multiplied by the prevailing hourly rate. *Staton v. Boeing Co.*, 327 F.3d 938, 965  
24 (9th Cir. 2003), quoting *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir.  
25 1996) (emphasis added).

26       More importantly, the combination of these incomplete records with the  
27 settlement provision that would "limit" attorney fees to 25 percent of the Gross  
28 Settlement Fund (not including expenses, also paid from the Fund) and

1 Defendants’ covenant not to dispute such fee and expense requests strongly  
2 suggests that the so-called lodestar amount is actually targeted at reaching that 25  
3 percent. (Even despite the 25 percent “limit” to fees, current calculations suggest  
4 that the fees could exceed that percentage.) Calculating attorneys’ fees into the  
5 common fund of a class action settlement is an “irregular,” and “improper”  
6 procedure. *Staton*, 327 F.2d at 969, 970–71 (“courts have to be alert to the  
7 possibility that the parties have adopted this hybrid course precisely because the  
8 fee award is in fact higher than could be supported on a statutory fee-shifting basis  
9 ... [such an agreement deprives] the court supervisory discretion to determine the  
10 distribution of the total settlement package between counsel and the class.”)

11 Class counsel’s further requests for fees since the initial approval of the  
12 settlement are equally poorly documented and outrageous. There is no attempt by  
13 class counsel to show that its fees were reasonably necessary to serve the class, let  
14 alone a sufficient showing for the Court to determine their appropriateness.

15 Given the lack of information surrounding the attorneys’ fees calculations,  
16 as well as itemization of expenses and the absence of any available information  
17 concerning class counsels’ retention of expert witnesses, insufficient information  
18 exists to permit a reasonable lodestar calculation in this case. On the other hand,  
19 the presence of negotiated settlement terms pertaining to class counsel’s  
20 attorneys’ fees as well as the huge purported lodestar number and excessive  
21 proportion of the ultimate fee request to the total settlement fund, the evidence is  
22 clear that the fee award requested is excessive, if appropriate at all.

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**III.**  
**CONCLUSION**

In light of the foregoing, Plaintiff-Objectors Aaron Lukoff, John Prendergast, and David Orange respectfully request the Court deny class counsel's Motion for distribution of the settlement fund.

Dated: October 19, 2009

By:           /s/ Joshua R. Furman            
Joshua R. Furman  
Jon M. Zimmerman  
*Attorneys for Plaintiff-Objectors,*  
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