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

12
13 RYAN RODRIGUEZ, REENA B.
14 FRAILICH, LOREDANA NESCI,
15 JENNIFER BRAZIL, and LISA GINTZ,
16 on behalf of themselves and all others
17 similarly situated,

18 Plaintiffs,

19 vs.

20 WEST PUBLISHING CORPORATION,
21 a Minnesota Corporation dba BAR/BRI,
22 and KAPLAN, Inc., a Delaware
23 Corporation,

24 Defendants.

Case No. CV 05-3222-R

The Honorable Manuel L. Real

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SETTLING CLASS PLAINTIFFS'
MOTION FOR DISTRIBUTION OF
THE NET SETTLEMENT FUND
UPON THE OCCURRENCE OF
THE EFFECTIVE DATE AND FOR
APPROVAL AND DISTRIBUTION
OF ATTORNEYS' FEES AND
EXPENSES**

Date: November 2, 2009

Time: 10:00 a.m.

Courtroom: 8

25 AND CONSOLIDATED ACTION
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In accordance with the Stipulation and Settlement Agreement dated February 7, 2007 (“Stipulation”)¹ (*see* Exh. 1 attached to accompanying Declaration of Sidney K. Kanazawa (“Kanazawa Decl.”)) and the previous Orders issued by this Court, the Settling Class Plaintiffs hereby move for an Order:

- approving the Claims Administrator’s determinations concerning the identity and amounts to be distributed to Authorized Claimants;
- authorizing distribution of the Net Settlement Fund to the Authorized Claimants in the amounts determined by the Claims Administrator upon the Effective Date of the Settlement;²
- reaffirming Class Counsel’s original award of attorneys’ fees and expenses;
- authorizing distribution of Class Counsel’s attorneys’ fees and expenses from the Gross Settlement Fund upon the Effective Date of the Settlement;
- authorizing distribution of attorneys’ fees to certain Objectors from the Gross Settlement Fund in accordance with the Court’s August 7, 2009 Order upon the Effective Date of the Settlement; and
- approving a payment to Rust Consulting, Inc. for the balance of its fees and expenses incurred and to be incurred in connection with the Settlement.

¹ Unless otherwise stated, all capitalized phrases have the same meaning as those in the Stipulation.

² The Effective Date of the Settlement will occur when issues relating to attorneys’ fees are concluded. Stipulation ¶ 61(f).

1 of fees and expenses would be paid pursuant to an Order of the Court. *See id.*, Exh.
2 3 at 5. The Court denied fees and expenses to Class members who objected to the
3 Settlement. *See id.*, Exh. 6.

4 Following approval of the Settlement, certain objectors appealed the
5 Settlement and the Fee Order to the Ninth Circuit Court of Appeals. On April 23,
6 2009, the Ninth Circuit affirmed this Court's approval of the Settlement, but
7 reversed and remanded the Fee Order, requiring this Court to consider "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 determine a "reasonable amount [of
10 attorneys fees for Objectors' Counsel] given their contribution to the denial of the
11 requests for incentive awards." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948,
12 968-69 (9th Cir. 2009).

13 This Court addressed the question of attorneys' fees for Objectors' counsel
14 and awarded \$16,250 to certain Objectors' counsel and denied attorneys' fees to all
15 others. ("Objector Fee Order"). *See Kanazawa Decl.*, Exh. 7. While certain
16 objectors have appealed the Objector Fee Order to the Ninth Circuit, no stay has
17 been requested and none has been granted. These appeals therefore pose no bar to
18 entry of the requested Order herein.

19 **B. Claims Administration**

20 The Stipulation required the Claims Administrator to identify Authorized
21 Claimants by determining which Claim Forms presented valid Claims and by
22 providing those who submitted defective Claim Forms with notice and an
23 opportunity to cure. *See Stipulation at ¶49.* As set forth more fully in the
24 accompanying Miller Declaration, the Claims Administrator scrupulously followed
25 the procedure and claim process, and has identified all Authorized Claimants and
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1 the amount each Authorized Claimant should receive from the Net Settlement
2 Fund.⁶

3 All Class Members wishing to participate in the Settlement were required to
4 submit Proofs of Claim postmarked on or before September 17, 2007. As shown by
5 the Miller Declaration, the Claims Administrator received and reviewed all Proofs
6 of Claim submitted before August 18, 2009 – even those submitted after the
7 September 17, 2007 deadline. To the extent a Proof of Claim was deficient the
8 Claims Administrator notified the claimant of the deficiency and advised the
9 claimant as to methods for curing the deficiency. Where a claimant failed to cure a
10 defective claim after notice and ample opportunity, or where the Proof of Claim
11 showed the claimant was not entitled to receive a share of any of the Net Settlement
12 Fund, the Claims Administrator notified the claimant of the rejection and provided
13 the claimant with notice of the method for the claimant to request this Court’s
14 review of the Claims Administrator’s administrative determination rejecting the
15 Proof of Claim. Copies of sample deficiency and rejection letters are attached to the
16 Miller Declaration as Exhibits B, C, D, and F.

17 **III. THE COURT SHOULD APPROVE THE CLAIMS**
18 **ADMINISTRATOR’S DETERMINATIONS AND**
19 **AUTHORIZE DISTRIBUTION OF THE NET**
20 **SETTLEMENT FUND**

21 **A. The Claims Administrator’s Determinations Were Made in**
22 **Accordance with the Procedures Set forth in the Stipulation**

23 Settling Class Plaintiffs first request an order from this Court approving the
24 determinations of the Claims Administrator as set forth in the Miller Declaration.
25

26 ⁶ The Claims Administrator also implemented and followed a uniform process
27 for disputed claims. See Miller Decl. ¶¶ 22-25.

1 Based on the Claims Administrator's determinations, 81,273 individuals and entities
2 stand to receive monetary compensation from the Net Settlement Fund.⁷ Miller
3 Decl. ¶ 27.

4 The Authorized Claimants include approximately 2,551 claims received after
5 the September 17, 2007 deadline date set forth in the Notice. *Id.* at ¶ 28. No claim
6 has been rejected solely because it was received after this deadline, and no delay has
7 resulted from the acceptance of those claims. Given this lack of delay, it would be
8 inequitable to disallow an otherwise valid claim from participating in the Settlement
9 and recovering from the Net Settlement Fund solely because it was submitted after
10 the cut-off date. That said, for there to be a distribution, there must be a cutoff date
11 after which no more claims will be accepted. *In re Orthopedic Bone Screw Prods.*
12 *Liab. Litig.*, 246 F.3d 315, 329 (3d Cir. 2001) ("There is no question that in the
13 distribution of a large class settlement fund, 'a cutoff date is essential and at some
14 point the matter must be terminated.'") (citations omitted). For that reason, the
15 Proposed Order submitted herewith proposes that no claim submitted after August
16 18, 2009 – the last day upon which claims could be filed and still processed before
17 the present Motion's filing date – be accepted for any reason.

18 The Miller Declaration also notes 53 claimants have disputed the
19 determination of the Claims Administrator and wish to have this Court review their
20 claims. Miller Decl. ¶ 25. Descriptions of these claims are set forth in the Requests
21 by Claimants for Court Review of Claims Determinations, filed concurrently with
22 this Motion. As set forth more fully therein, Class Counsel concurs with the Claims
23 Administrator's determination.

24 Since the Claims Administrator has complied with the Stipulation's procedure
25 for determining the identity of Authorized Claimants and for providing Class

26 ⁷ These numbers could change slightly pending this Court's determination of
27 the 53 disputed claims. *See* Miller Declaration ¶25; *see also* accompanying Requests
28 by Claimants for Court Review of Claims Determinations.

1 members with an opportunity to cure, Class Counsel respectfully request this Court
2 approve the administrative determinations accepting or rejecting the Claims.

3 **B. Distribution of the Net Settlement Fund to all Authorized**
4 **Claimants is Appropriate**

5 Settling Class Plaintiffs also respectfully request this Court authorize the
6 distribution of the Net Settlement Fund to the Authorized Claimants upon the
7 Effective Date of the Settlement. Since all claims submitted by Class Members
8 have been processed pursuant to the Stipulation and Plan of Allocation, such
9 distribution would be appropriate. *See* Stipulation at ¶ 47; *Newberg on Class*
10 *Actions* (4th Ed. Nov. 2005) at § 11:33.⁸

11 The Miller Declaration chronicles all of the necessary information to
12 effectuate the distribution of the Net Settlement Fund. As set forth therein, the
13 Authorized Claimants (exclusive of the disputed claims) spent a total of
14 \$215,965,244.63 on their purchases of BAR/BRI courses during the Class Period.⁹
15 Miller Decl., ¶ 27. Under the Plan of Allocation, these Authorized Claimants (with
16 or without the allowance of disputed claims) will receive an amount that will be less
17 than the 30% of the cost of a BAR/BRI course purchased during the Class Period.
18 Miller Decl. ¶ 27. Therefore the *cy pres* provision of the Stipulation will have no
19 impact on the recovery of any Authorized Claimant or otherwise.

20 Once the Distribution Order is entered, distribution of the Net Settlement
21 Fund will be a ministerial act, and will require no further attention from the Court.

22 ⁸ Moreover, in order to encourage Class Members to promptly cash their
23 distributions and to avoid or reduce further expenses relating to unpaid distributions,
24 this Court should require that all the distribution drafts bear the following notation:
25 “CASH PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT
26 CASHED BY 180 DAYS AFTER ISSUE DATE.”

27 ⁹ If all of the disputed claims are allowed by the Court the total spent on
28 BAR/BRI courses during the Class Period would increase by \$56,181.19. Miller
Decl. ¶ 25.

1 Finally, to allow the full and fair distribution of the Net Settlement Fund, the
2 Stipulation bars any further claims against the Settlement Fund and provides that all
3 Persons involved the processing of claims will be released and discharged from any
4 and all claims arising out of such involvement. Stipulation at ¶ 49(h) and (k).
5 Accordingly, Settling Class Plaintiffs also request the Court bar all Class Members,
6 whether or not they are to receive payment from the Net Settlement Fund, from
7 making any further claim against the Net Settlement Fund or any Persons involved
8 in the review, verification, calculation, tabulation, or any other aspect of the
9 processing of the claims submitted herein, or otherwise involved in the
10 administration of the Settlement Fund or the Net Settlement Fund beyond the
11 amount allocated to them under the Plan of Allocation.

12 By authorizing distribution of the Net Settlement Fund on the Effective Date,
13 this Court would clear the way for 81,273 Authorized Claimants to receive their
14 portion of the Net Settlement Fund shortly after the Effective Date, and this Court
15 should order such distribution.

16 **IV. THE COURT SHOULD REAFFIRM ITS ORIGINAL**
17 **ORDER GRANTING CLASS COUNSEL ATTORNEYS’**
18 **FEEES AND REIMBURSEMENT OF EXPENSES AND**
19 **AUTHORIZE THE DISTRIBUTION OF THESE AWARDS**
20 **FROM THE GROSS SETTLEMENT FUND**

21 Settling Class Plaintiffs request that the Court reaffirm its award of attorneys’
22 fees and expenses for Class Counsel. As described above, this Court’s Fee Order
23 awarded Class Counsel a multiplier of 1.75 on their lodestar,¹⁰ not to exceed a cap of
24 25% of the Gross Settlement Fund, as well as reimbursement of their expenses. As

25 _____
26 ¹⁰ That same Order explicitly concluded that “Class Counsel’s hourly rates are
27 reasonable.” Kanazawa Decl., Exh. 3, at 5.

1 of October 1, 2009, the Gross Settlement Fund is approximately \$50,900,067. *See*
2 Stipulation at ¶14; n.3, *supra*.

3 Since the Court’s Fee Order, entered more than two years ago, the expenses
4 incurred and the time expended by Class Counsel have increased.¹¹ Class Counsel’s
5 collective lodestar in this case from its inception through August 31, 2009 is
6 approximately \$8,873,517.75. *See* Kanazawa Decl., ¶ 60 and Exhs. 8-10.
7 Application of the 1.75 multiplier to the collective lodestar of \$8,873,517.75 is
8 \$15,528,656.06. Since the Fee Order caps Class Counsel’s attorneys’ fees at 25% of
9 the Gross Settlement Fund (or \$12,725,016), Class Counsel would receive a
10 multiplier of 1.43 on their lodestar. Class Counsel request that this Court reaffirm
11 the Fee Order, and award Class Counsel 25% of the Gross Settlement Fund. As set
12 forth more fully herein, such an award would comport with both governing law, and
13 with the Ninth Circuit’s mandate that this Court consider “the effect, *if any*, of the
14 incentive agreements on [Class Counsels’] entitlement to fees.” *Rodriguez*, 562
15 F.3d at 969 (emphasis added).

16 **A. The Court’s Original Fee Award Was Appropriate**

17 The conclusions in the original Fee Order – that a fee award amounting to
18 _____

19 ¹¹ The majority of Class Counsel’s increase in lodestar was caused by Class
20 Counsel’s defense of the appeals filed by certain Objectors and by the
21 administration of the Settlement. The Fee Order explicitly contemplated such
22 lodestar would be included in the final fee awarded by this Court. *See* Kanazawa
23 Decl., Exh. 3, at 5 (noting “Class Counsel have advised the Court that they have and
24 will continue to respond to Class Member inquiries, communicate with and monitor
25 the Claims Administrator, and otherwise monitor the Settlement administrative
26 process” and further noting that “[s]hould any objectors file an appeal from the Final
27 Approval Judgment, Class Counsel will have to perform additional work to ensure
28 that the appeal is dismissed or the Final Approval Judgment is affirmed in all
respects.”)

1 Class Counsel’s lodestar as of the Effective Date with a 1.75 multiplier, capped at
 2 25% of the Settlement Fund – were well founded, and should not be disturbed. The
 3 Ninth Circuit resoundingly affirmed the settlement as “fair and reasonable no matter
 4 how you slice it” and explicitly acknowledged the risks and difficulty of this
 5 litigation, which “did not have the benefit . . . of previous litigation between the
 6 defendants and the government.” *Rodriguez*, 563 F.3d at 955. These were the same
 7 risk factors this Court previously noted justified the multiplier in the original Fee
 8 Order; then – as now – those risk factors justified an upward departure from Class
 9 Counsel’s lodestar.

10 **B. The Incentive Agreements Did Not Diminish the Efforts or Results**
 11 **of Class Counsel in this Case**

12 While the Ninth Circuit held that a subset of the class representatives in this
 13 case were conflicted, that Court went on to conclude that “the presence of conflicted
 14 representatives was harmless.” *Rodriguez*, 563 F.3d at 955. Nevertheless, the Ninth
 15 Circuit asked this Court to “revisit” the Fee Order to ensure this Court considered
 16 the Incentive Agreements when awarding Class Counsel fees. *Id.* at 967 (noting this
 17 Court “nowhere appears to have considered the effect” of the Incentive Agreements
 18 on the Fee Award.). The Ninth Circuit did so without expressing an opinion as to
 19 the whether there should be any effect on the attorneys’ fees awarded in this case.
 20 *Id.* at 968 (requesting consideration of “the effect, *if any*, of” the Incentive
 21 Agreements) (emphasis added).¹²

22 _____
 23 ¹² The Ninth Circuit also noted that the law firms of Finkelstein Thompson LLP
 24 and Zwerling, Schachter & Zwerling – who represented class representatives Kari
 25 Brewer and Lorraine Rimson – had not entered into the Incentive Agreements that
 26 were the subject of the Ninth Circuit’s opinion. *Rodriguez*, 563 F.3d at 961.
 27 Accordingly, the Ninth Circuit explicitly ruled that neither of these law firms, nor
 28 the clients they represent, suffered from *any* conflict of interest. *Id.* Indeed, the
 Ninth Circuit ultimately held that the presence of these two firms prevented any

1 As set forth below, under California law, the Court’s Fee Order was proper.
 2 As a Matter of Law, California Law Requires an Egregious Violation of the Ethical
 3 Rules and Resulting Harm, Both of Which Are Absent Here, to Justify a Forfeiture
 4 of Attorneys’ Fees

5 The Ninth Circuit correctly recognized that California state law controls any
 6 effect the Incentive Agreements might have on Class Counsel’s fee award.
 7 *Rodriguez*, 563 F.3d at 967-68.¹³ California courts analyze the effect of a conflict of
 8 interest on attorneys’ fees by focusing on the egregiousness of the conduct, the harm
 9 suffered, and if (and *only* if) there is harm, whether a remedy is necessary to
 10 compensate for it.¹⁴ California law explicitly rejects the idea that an attorney’s
 11 conflict of interest requires an automatic forfeiture of fees. Instead, California law

12 concerns about adequacy of representation from affecting the finality of the
 13 Settlement. *Id.* (“[T]he participation of two firms that did not enter incentive
 14 agreements, Finkelstein Thompson and Zwerling, Shachter & Zwerling, assuages
 15 any additional concerns that a conflict created by the incentive agreements may have
 16 adversely affected the adequacy of representation.”). As such, even if this Court
 17 determines the conflict of interest affects Class Counsel’s award of fees, such
 18 determination should *not* affect Finkelstein Thompson LLP and Zwerling, Schachter
 19 & Zwerling’s fee award in any way.

19 ¹³ *Flatt v. Superior Court*, 885 P.2d 950 (Cal. 1994) – cited by the Ninth Circuit
 20 – is not about entitlement to fees. That case holds that when a lawyer discovers a
 21 direct and unwaivable conflict between a new and an existing client he must
 22 withdraw immediately from the second representation and give no further legal
 23 advice from the new client. *Id.* at 279. The *Flatt* Court further cautioned that “Our
 24 holding is narrow, confined to the circumstances typified by this case—one in which
 25 the attorney is confronted with a mandatory and unwaivable duty not to represent
 26 the second client in light of an irremediable conflict with the existing client and acts
 27 promptly to terminate the relationship after learning of the conflict.” *Id.*

28 ¹⁴ An automatic forfeiture rule runs counter to the equitable principles that
 underlie an award of attorneys’ fees from a “common fund.” See *Boeing Co. v. Van*
Gemert, 444 U.S. 472, 478 (1980).

1 requires that there be a “serious violation of the attorney's responsibilities before an
 2 attorney who violates an ethical rule is required to forfeit fees.” *Pringle v. La*
 3 *Chapelle*, 73 Cal.App.4th 1000, 1006 (Cal. Ct. App. 1999); *see also Sullivan v.*
 4 *Dorsa*, 27 Cal.Rptr.3d 547, 561 (Cal. Ct. App. 2005) (awarding fees because
 5 challenger “fail[ed] to show that any violation of the rules governing representation
 6 of adverse interests was serious enough to compel a forfeiture of fees.”)¹⁵

7 Multiple California cases illustrate these principles. For example, in *Frye v.*
 8 *Tenderloin Housing Clinic*, 129 P.3d 408 (Cal. 2006), the Supreme Court of
 9 California examined whether the defendant non-profit corporation had engaged in
 10 the unauthorized practice of law and, if so, whether its client, Mr. Frye, was entitled
 11 to bar defendant from a fee award and obtain disgorgement of fees collected. The
 12 _____

13 ¹⁵ *Image Tech. Serv. v. Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998) –
 14 cited by the Ninth Circuit – is not to the contrary. *Image Tech.* involved a law firm
 15 representing the plaintiff in a case alleging violations of the Clayton Act despite the
 16 fact that the firm also represented the defendant in connection with other matters.
 17 That firm was disqualified shortly before trial for this egregious violation of the
 18 rules of professional conduct; the trial ultimately resulted in a verdict in the
 19 plaintiff’s favor. *Id.* at 1355 – 56. Under those circumstances, the Ninth Circuit
 20 deemed it inequitable to apply the Clayton Act’s mandatory fee shifting provisions
 21 to require the defendant to pay the conflicted firm’s attorneys’ fees. Neither the
 22 egregious conflict nor the fee-shifting issues in *Image Tech.* are present here, and
 23 the case accordingly does not compel a finding that the Incentive Awards should
 24 impact Class Counsel’s fee award.

25 Even if *Image Tech.* did counsel in favor of an automatic forfeiture – and it
 26 does not – this Court should decline to apply such a rule here. The Ninth Circuit’s
 27 interpretations of state law are “only binding in the absence of any subsequent
 28 indication from the California courts that our interpretation was incorrect.” *Munson*
v. Del Taco, Inc., 522 F.3d 997, 1002 (9th Cir. 2008). Since *Pringle* explicitly
 rejected an “automatic forfeiture” rule *after Image Tech.* was decided, any
 inconsistency between the two must be resolved in favor of the principles articulated
 in *Pringle*. Those principles, again, only counsel in favor of any forfeiture of fees
 when an alleged ethical violation is egregious and causes harm to the client.

1 Court rejected the demand for a denial of fees in the form of disgorgement because
2 Frye had suffered no harm. *Id.* at 239.

3 Similarly, in *Slovensky v. Friedman*, 49 Cal.Rptr.3d 60 (Cal. Ct. App. 2006),
4 counsel not only violated the rule against conflicting representation (*CRC* 3-310),
5 but also engaged in several acts of fraud, concealment and breach of client
6 confidentiality. These allegations were the basis for plaintiff's claims of malpractice
7 and breach of fiduciary duty for which she sought a disgorgement of fees from her
8 counsel. *Id.* at 71-72. The *Slovensky* court nonetheless found that disgorgement
9 (*i.e.*, a denial of fees to her counsel) was **not** warranted under the Supreme Court's
10 decision in *Frye* because defendant's conduct had caused plaintiff **no** damages. *Id.*
11 Again, the equitable principle prevailed. *Accord Mardirossian & Assoc. v. Ersoff*,
12 62 Cal.Rptr.3d 665, 681 (Cal. Ct. App. 2007) (denying forfeiture of fees because
13 challenger "has not shown the violation was particularly egregious or that he was in
14 any way prejudiced by it.")

15 Under these principles, then, the Fee Order was correct and should be
16 implemented through this distribution unless it is shown that the incentive
17 agreements were both egregious violations of the code of professional ethics and
18 caused harm to the class. Neither proposition is tenable.

19 **1. The Incentive Agreements Did Not Constitute**
20 **Egregious Ethical Violations or Result in any Harm to**
21 **the Class**

22 This Court's original Opinion on Plaintiffs' Motion for Final Approval aptly
23 noted that this was the "first case" in which a class counsel entered into an incentive
24 fee agreement and further noted that "some commentators have opined that such
25 agreements might be acceptable." Kanazawa Decl., Exh. 5 at 27. While this Court
26 (and the Ninth Circuit) ultimately ruled such agreements were unacceptable, the fact
27 that that the incentive agreements did not violate any existing authority and were
28 supported by some legal commentary strongly militates against a finding that the

1 Incentive Awards were the type of “serious violation” that compels a forfeiture of
2 fees. *Pringle*, 73 Cal.App.4th at 1006. Class Counsel acted in good faith and
3 committed no willful or intentional violation of any ethical rule that justifies a
4 reduction or forfeiture of attorneys’ fees.

5 This conclusion is buttressed by the Ninth Circuit’s explicit conclusion that
6 “the presence of conflicted representatives was *harmless*” and that “the negotiated
7 settlement amount is fair and reasonable no matter how you slice it.” *Rodriguez*,
8 563 F.3d at 961, 965 (emphasis added). Since “harm” is a necessary prerequisite for
9 any forfeiture of fees, there can be no forfeiture here. *Frye*, 129 P.3d at 239.

10 Indeed, the Ninth Circuit’s explicit finding that class counsel’s representation was
11 adequate, (*Rodriguez*, 563 F.3d at 961), is, in itself, a complete bar to forfeiture
12 under California law. Moreover, this Court’s denial of any incentive awards cured
13 any potential harm created by the Incentive Agreements by ensuring that the Net
14 Settlement Fund will not be reduced by any incentive payments. Therefore, it
15 would be inequitable to reduce Class Counsel’s fees, and such forfeiture would be
16 contrary to the controlling California law. *See Frye, supra* at 50.

17 Settling Class Plaintiffs therefore respectfully request that the Court approve
18 and authorize the distribution of \$12,725,016 as an award of attorneys’ fees from the
19 Gross Settlement Fund to Class Counsel.

20 The Court Should Reaffirm its Award of Expenses to Class Counsel and Authorize Disbursement

21 The Court should reaffirm its award of expenses to Class Counsel and
22 authorize disbursement for those expenses. *Kanazawa Decl.Exh. 3* at p.5. It is well
23 established that counsel who create a common fund are entitled to the
24 reimbursement of expenses they advance to a class. *See, e.g. In re American Bank*
25 *Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001). Accordingly,
26 expenses advanced by Class Counsel (\$1,637,240) should be approved and
27 authorized for disbursement to Class Counsel. *See Kanazawa Decl.*, ¶ 60 and Exhs.
28 8-10.

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V. THE COURT SHOULD AUTHORIZE THE DISTRIBUTION OF THE AWARD OF ATTORNEYS' FEES TO OBJECTORS FROM THE NET SETTLEMENT FUND

As discussed above, on July 13, 2009, the Court granted attorneys fees in the amount of \$8,125.00 to the objecting parties represented by John William Davis and \$8,125.00 to the objecting parties represented by C. Benjamin Nutley, for a total award of \$16,250.00. Kanazawa Decl., Exh. 7. Settling Class Plaintiffs respectfully request that the Court authorize the distribution of these attorney fee awards from the Net Settlement Fund.

VI. THE COURT SHOULD APPROVE AND AUTHORIZE THE PAYMENT OF THE CLAIMS ADMINISTRATOR'S FEES AND EXPENSES

Settling Class Plaintiffs also respectfully request that the Court approve and authorize from the Settlement Fund the payment of the current fees and expenses of the Claims Administrator as set forth in the Miller Declaration, ¶ 32.

VII. CONCLUSION

Based on the foregoing, Settling Class Plaintiffs respectfully request that the Court grant this motion and enter the accompanying [Proposed] Order Granting Motion for Distribution of the Net Settlement Fund upon the Occurrence of the Effective Date and for Approval and Distribution of Attorneys' Fees and Expenses.

DATE: October 9, 2009

Respectfully submitted,

McGUIREWOODS LLP

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