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8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12

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

16 Plaintiffs,

17 vs.

18 WEST PUBLISHING  
19 CORPORATION, a Minnesota  
Corporation d/b/a BAR/BRI, and  
20 KAPLAN, INC., a Delaware  
Corporation,

21 Defendants.  
22  
23

Case No. 2:05-cv-3222 R (MCx)

OPPOSITION TO MOTION FOR  
APPROVAL AND DISTRIBUTION  
OF ATTORNEYS' FEES AND  
EXPENSES

(SCHNEIDER/HEAD OBJECTORS)

Date: November 2, 2009  
Time: 10:00 a.m.  
Courtroom: 8

Hon. Manuel L. Real

24 AND CONSOLIDATED ACTIONS  
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1 Objectors George Schneider, Jonathan M. Slomba, James Puntumapanitch,  
 2 Justin Head and Ryan Helfrich (the “Head/Schneider Objectors”) hereby oppose  
 3 Plaintiffs’ Motion for Distribution of the Net Settlement Fund upon the Occurrence of  
 4 the Effective Date and for Approval and Distribution of Attorneys’ Fees and Expenses  
 5 (“The Motion”).<sup>1</sup>

6 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

7 On September 10, 2007, this court issued an order approving the settlement of  
 8 this case, but denying incentive awards to the class representatives, finding, among  
 9 other things, that the incentive award agreement was “inappropriate and contrary to  
 10 public policy,” and that it violated the California Rules of Professional Conduct  
 11 “prohibiting fee-sharing with clients and fee-splitting among lawyers.” Opinion and  
 12 Order (Doc. No. 432) at 27-30. The court found that the incentive agreement created  
 13 not only “the appearance of impropriety” (*Id.* at 33) but an actual conflict of interest  
 14 between the named plaintiffs and the rest of the class. *Id.* at 34-36. Moreover, “the  
 15 parties did not disclose their agreement to the Court from the outset and the agreement  
 16 was never disclosed to the class... no one informed the Court of the Incentive  
 17 Agreement until well after the Preliminary Approval Hearing... The failure to disclose  
 18 this agreement to the Court violates the class representatives’ fiduciary duties to the  
 19 class and duty of candor to the Court.” *Id.* at 35. This court also ruled that “It is  
 20 disingenuous, improper, and a violation of the Federal Rules, for class counsel to  
 21 request and argue for an arbitrary, contractually-obligated incentive award that is not  
 22 reflective of the factors courts consider in granting such requests.” *Id.* at 27, citing  
 23 FRCP Rule 11.

24 In the course of reversing and remanding Plaintiffs’ fee award, the Ninth Circuit  
 25 expressly agreed with this Court that “[T]he *ex ante* incentive agreements created

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26  
 27 <sup>1</sup> With respect to those items discussed at pages 1-8 and 14 of Plaintiffs’ Motion For  
 28 Distribution of the Net Settlement Fund upon the Occurrence of the Effective Date [etc.], the  
 Head/Schneider Objectors do not take a position as long as the Effective Date is determined in  
 compliance with paragraphs 61 and 62 of the Stipulation of Settlement.

1 conflicts among the five contracting class representatives, their counsel, and the rest of  
2 the class. We disapprove of them.” *Rodriguez v. West Publishing Corp.*, 563 F.3d  
3 948, 955 (9<sup>th</sup> Cir. 2009). The incentive agreements “put class counsel and the  
4 contracting class representatives into a conflict position from day one.” *Id.* at 959.  
5 The panel particularly faulted counsel for failing to bring the contractual provisions to  
6 the attention of the Court, particularly at the class certification stage. *Id.*

7 Thus, the Ninth Circuit clearly found that class counsel was equally as culpable  
8 as the class representatives in failing to bring the incentive agreements and the  
9 attendant conflict to the attention of the court. This is clear from the Ninth Circuit’s  
10 admonition to the this court to consider the effect that the conflict of interest, which  
11 has been established as a matter of law in this case, has on an entitlement to fees by  
12 the McGuire Woods firm:

13 We think it appropriate for the district court to consider whether counsel  
14 could represent both the class representatives with whom there was an  
15 incentive agreement, and absentee class members, without affecting the  
16 entitlement to fees.

17 *Id.* at 968.

18 The Ninth Circuit recited the principles the Head/Schneider objectors pointed  
19 out prior to final approval: representation of clients with conflicting interests results in  
20 a denial of fees, excepting *quantum meruit* claims for services rendered before the  
21 conflict arose. *Id.* at 967-68. Although the panel declined to opine on the effect of  
22 those principles on the fee request, it was assured that the conflict created here was not  
23 trivial, accidental, unforeseeable: “We realize that conflicts of interest among class  
24 members are not uncommon and arise for many different reasons. However, the  
25 conflict of interest inhering in the incentive agreements did not just happen, nor was it  
26 a conflict that developed beyond the control or perception of class counsel. It was  
27 inserted into the retainer agreement.” *Id.* at 968.

28 Now, Plaintiffs again move for the payment of their attorneys’ fees and, in the

1 words of Yogi Berra, it's "*Deja vu* all over again." As they did in their previous  
2 motion, before the Ninth Circuit vacated their fee award, Plaintiffs again argue that  
3 their counsel should be fully compensated for every hour they devoted, plus a hearty  
4 multiplier on each such hour, including the time spent:

- 5 • creating, litigating over, and then handling the conflict of interest, fee  
6 splitting and inadequacy of representation issues in the case;
- 7 • advocating on behalf of the representative plaintiffs' request for  
8 incentive awards, which were then denied on ethical grounds;
- 9 • seeking their own fee and unsuccessfully defending it on appeal; and
- 10 • unsuccessfully opposing the Head/Schneider fee request and subsequent  
11 appeal.

12 Plaintiffs attempt this with scant development of the factual record and without  
13 any valid legal argument that could explain why ethical rules recognized by California  
14 courts, this court, and the Ninth Circuit could not possibly affect their fee in this case.

15 As the Head/Schneider Objectors have long pointed out, the facts of this case  
16 squarely invoke the doctrine that lawyers who operate under an impermissible conflict  
17 of interest cannot obtain fees for their representation. That doctrine *must* affect the  
18 consideration of the fee to be awarded in this case, and Plaintiffs' arguments to the  
19 contrary are unavailing.

20 There are additional infirmities in class counsel's bid for payment in this case,  
21 the most glaring of which is an astonishing increase in the claimed lodestar since class  
22 counsel first sought fees in the case at the time of final approval. This lodestar  
23 increase is evidently the result of massive billings by senior lawyers, some of whom  
24 increased their hourly rates dramatically, without any real explanation as to the  
25 character of their activities, or the need for them. Thus, even without the ethical  
26 issues that overshadow the fee proceeding, there is ample reason to refuse to award  
27 any fee without substantial additional information and explanation.

28

1 **II. ARGUMENT**

2 **A. The Conflict of Interest and Other Ethical Breaches by Class**  
3 **Counsel Require a Reduction in the Fee Awarded Without any**  
4 **Requirement that Absent Class Members Demonstrate Additional**  
5 **“Harm”**

6 In reversing and remanding Class Counsel’s initial fee award in this case, the  
7 Ninth Circuit cited *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354,  
8 1358 (9th Cir. 1998), which held that “Simultaneous representation of clients with  
9 conflicting interests (and without written informed consent) is an automatic ethics  
10 violation in California and grounds for disqualification. . . .An attorney cannot recover  
11 fees for such conflicting representation. . . . because ‘payment is not due for services  
12 not properly performed.’ citing *Blecher & Collins v. Northwest Airlines, Inc.*, 858 F.  
13 Supp. 1442, 1457 (C.D. Cal. 1994), quoting *Cal Pak Delivery, Inc. v. United Parcel*  
14 *Service*, 52 Cal.App.4th 1, 14, n.2 (1997). That case is hardly unique, and it embodies  
15 a longstanding doctrine that is of particular application in this case.

16 In an attempt to extricate themselves from the *Image Tech* case, Plaintiffs  
17 suggest that it does not accurately state the law of California, and that class members  
18 must show that the violation was particularly serious and caused financial harm to the  
19 client. But there is no doubt that the *Image Tech* case is founded upon well-  
20 established California law, at least as applied to the facts of *this* case, a class action in  
21 which there was a contingent incentive award agreement between class counsel and  
22 most of the class representatives, which created a conflict that was not just apparent or  
23 minor, but an “actual manifestation of conflicting interests.” Order and Opinion  
24 (Doc. No. 432) at 36.

25 “It is settled in California that an attorney may not recover for services rendered  
26 if those services are rendered in contradiction to the requirements of professional  
27 responsibility.” *Goldstein v. Lees*, 46 Cal.App.3d 614, 618 (1975). Courts have not  
28 required a showing that the violation was particularly egregious in the case of

1 concurrent representation conflicts, for which the violation is to the duty of loyalty,  
2 rather than confidentiality. See *Gilbert v. National Corp. for Housing Part.*, 71  
3 Cal.App.4th 1240, 1253 & n.8 (1999); citing *Forrest v. Baeza*, 58 Cal.App.4th  
4 65,73-74 (1997) (distinguishing the simultaneous representation of conflicting  
5 interests from successive representation cases). The violation of the prohibition  
6 against representing adverse interests is inherently serious: there is not a lesser degree  
7 of disloyalty that excuses an attorney's concurrent representations of conflicting  
8 interests. See *Gilbert*, 71 Cal.App.4th at 1254-1256 (not error to disqualify attorney  
9 on the eve of trial for conflict of interest in light of need to "preserve public trust in  
10 the administration of justice and the integrity of the bar"; clients' right to retain  
11 counsel of their choice "must yield to the court's obligation to protect 'the very  
12 integrity of the judicial process' from a violation of the ethical standards of  
13 professional responsibility.") Disqualification and denial of fees occurs without  
14 regard to the bad faith of the lawyers involved, because of the harm that would  
15 otherwise arise to the public perception of the fair administration of justice:

16       The preservation of public trust both in the scrupulous administration of  
17       justice and in the integrity of the bar is paramount. . . . [The client's  
18       recognizably important right to counsel of his choice] must yield,  
19       however, to considerations of ethics which run to the very integrity of our  
20       judicial process.

21 *Comden v. Superior Court*, 20 Cal.3d 906, 915 (1978), quoting *Hull v. Celanese*  
22 *Corporation*, 513 F.2d 568, 572 (2d Cir. 1975); applied, *Cal Pak Delivery*, 52  
23 Cal.App.4th at 13.

24       In addition, Plaintiffs simply ignore the body of authority establishing that class  
25 actions present a special case in which the mere appearance of impropriety resulting  
26 from conflicting representation is sufficient to compel disqualification and a denial of  
27 fees. See *Bruno v. Bell*, 91 Cal.App.3d 776 (1979). In *Bruno*, the court reversed an  
28 award of fees to an attorney who, as a pro per plaintiff representing the taxpayers of

1 California, had successfully challenged a statute as unconstitutional. The court noted  
 2 that it is “improper for an attorney to prosecute a fee-generating class action suit in  
 3 which he himself was named as plaintiff.” *Bruno*, 91 Cal.App.3d at 788 citing *Kramer*  
 4 *v. Scientific Control Corp.*, 534 F.2d 1085 (3d. Cir. 1976). The court concluded:

5 Without questioning Bruno’s integrity and assuming he acted out of the  
 6 highest motives, we must nonetheless be cognizant . . . that “on occasion,  
 7 ethical conduct of a lawyer may appear to laymen to be unethical.”

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

12 *Bruno*, 91 Cal.App.3d at 788. See also *Huston v. Imperial Credit Commercial*  
 13 *Mortgage Inv. Corp.*, 179 F.Supp.2d 1157, 1167 (C.D. Cal 2001) (in class actions,  
 14 disqualification for undisclosed conflicts and consequent denial of fees is more likely  
 15 because class counsel are held to a “heightened standard” of conflict avoidance) citing  
 16 *Palumbo v. Tele- Communications, Inc.*, 157 F.R.D. 129, 132-33 (D.D.C. 1994).

17 Under these cases, the motive of the attorney is irrelevant, and no separate  
 18 showing of “harm” is required. Because Plaintiffs fail to acknowledge the factual and  
 19 procedural posture of this case, the cases they cite are readily distinguishable.<sup>2</sup>  
 20 Plaintiffs cite, for example, *Mardirossian v. Ersoff*, 153 Cal.App.4th 257, 264 (2007).  
 21 There, the trial court found at most a *potential* conflict of interest between clients, and  
 22 that the consent form the client signed was “sufficient and valid for the potential  
 23 conflict that existed during the relevant period.” *Id.* at 264. Here, by contrast, there  
 24 was an actual conflict of interest that had a distinct effect on the proceedings, both in  
 25 fact and in appearance. Moreover, in *Mardirossian*, the trial court found that there

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26  
 27 <sup>2</sup> In fact, Plaintiffs cited most of them to the Ninth Circuit, to little avail. See Brief of  
 28 Appellees filed before the Ninth Circuit, at 60-61 (citing *Mardirossian v. Ersoff*, *Pringle v.*  
*LaChapelle*, and *Sullivan v. Dorsa*); compare Reply Brief of Appellants Head/Schneider, et al. at 19-  
 20 (distinguishing same cases).

1 was *no violation* of Rule 3-310, and the client did not challenge that finding on  
2 appeal. *Id.* at 278-279.<sup>3</sup> Here, by contrast, both this court and the Ninth Circuit found  
3 such a violation.

4 *Pringle v. La Chapelle*, 73 Cal. App. 4<sup>th</sup> 1000 (1999) is equally inapposite.  
5 There, the client signed a written waiver of conflict, both individually and on behalf of  
6 a corporation. The client later sought to avoid his individual fees by raising the  
7 conflict issue after the fact – so that the asserted “ethical breach” amounted to no more  
8 than the fact that the waiver was allegedly signed by the wrong person at the  
9 corporation. Not surprisingly, all of the courts involved found that there had been no  
10 violation of Rules of Prof. Conduct 3-310 or 3-600, so that the client could not avoid  
11 paying the fee. *Id.* at 1004-1005.

12 *Sullivan v. Dorsa*, 128 Cal.App.4<sup>th</sup> 947 (2005) involved a partition action in  
13 which the issue was whether fees incurred by lawyers hired by the partition referee  
14 deciding the case should be disallowed after a conflict of interest had arisen by virtue  
15 of the law firm’s pre-existing relationship with the prospective purchaser of the  
16 property. *Id.* at 964. But the court found that the referee’s attorneys did not owe the  
17 same duties to the owners of the property as to the referee and, in any event, the  
18 property owners made no showing that they ever became clients of those attorneys.  
19 *Id.* at 964-65. Here, by contrast, there is no question that the class members are clients  
20 to whom class counsel and the class representatives owed the highest duties of loyalty.

21 *Frye v. Tenderloin Housing Clinic*, 38 Cal. 4<sup>th</sup> 23 (2006) did not involve  
22 disqualification for conflict of interest, nor any violation of a rule of professional  
23 conduct. The question was whether a client could sue a nonprofit law corporation to  
24 obtain restitution or disgorgement of statutory fees earned in a case when the  
25 nonprofit had not properly registered to practice law in the jurisdiction. *Id.* at 48 *et*  
26 *seq.* If the issue presented alone does not give away *Frye*’s dubious relevance, the

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28 <sup>3</sup> The panel’s additional explanation that a violation of Rule 3-310 would not necessarily result in a total denial of fees is not a holding of the court.

1 Court’s ensuing discussion of the public interest issues surrounding nonprofit law  
 2 corporation registration<sup>4</sup> – none of which has any bearing on any issue in this case –  
 3 will remove all doubt.

4 *Slovensky v. Friedman*, 142 Cal.App.4th 1518 (2006) involved review of a  
 5 summary judgment against a plaintiff suing attorneys for malpractice and  
 6 disgorgement of fees, concluding that plaintiffs must show damages to state a cause of  
 7 action for common law breach of fiduciary duty. *Id.* at 1536. The plaintiff had no  
 8 damages because the defendant lawyers had obtained for her a recovery in the  
 9 underlying action that she was not legally entitled to in the first place. *Id.* at 1522 and  
 10 1536. Because the class here is not suing class counsel for breach of fiduciary duty,  
 11 there is no useful analogy to this case to be found either in *Slovensky* or in *Frye*.  
 12 Neither case in any way limits the effect of the authorities the Head/Schneider  
 13 Objectors have cited, nor suggests that objectors must show additional financial  
 14 “harm” to the class to justify a reduction in the fee.

15 Of the cases Plaintiffs cite, there was no actual conflict of interest in  
 16 *Mardirossian*, *Pringle*, *Sullivan*, or *Frye*. And *Frye* and *Slovensky* involved clients  
 17 suing lawyers for disgorgement of fees under causes of action requiring a showing of  
 18 damages or harm. None of the cases comes near to considering the effect of a  
 19 judicially-recognized conflicting concurrent representation upon the fee of class  
 20 counsel ensnared in the conflict.<sup>5</sup>

21 Finally, Plaintiffs try to minimize the effect of *Flatt v. Superior Court*, 9 Cal. 4<sup>th</sup>  
 22 275 (1994) by indicating that it is limited to the duty to withdraw in the face of

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23  
 24 <sup>4</sup> See *id.* at 48-53, discussing numerous practical and constitutional issues surrounding  
 25 nonprofit law practice and concluding by referring to the State Bar the issue of whether additional  
 26 regulation of nonprofit corporation law practice is required and then instructing the State Bar to  
 report to the Court after further study.

27 <sup>5</sup> As in *Mardirossian*, the *Pringle* court’s later ruminations (see *id.* at 1005-1006) on  
 28 whether the violation of ethical rules would always preclude fees are but *dicta*, and in no way were  
 they intended to apply to a class action such as this one, in which ethical violations, including the  
 concurrent representation of conflicting interests, have been established as a matter of law and fact.

1 conflict, and not the forfeiture of fees. Plaintiffs' Memorandum at 10, n.13. Plaintiffs  
2 miss the point entirely: here class counsel violated *Flatt* by failing to withdraw in the  
3 face of conflict. As the cases following *Flatt* point out, the consequence of a *Flatt*  
4 violation is essentially retroactive disqualification, and that the lawyer is not entitled  
5 to fees billed after the conflict – and duty to withdraw – arose.

6 **B. The Court Should Require Production of Detailed Time Records and**  
7 **Should Not Compensate Time Related to Litigating the Ethical and**  
8 **Conflict of Interest Issues**

9 Plaintiffs urge the court to re-adopt its prior order awarding a 1.75 multiplier on  
10 lodestar, to a cap of 25% of the class fund. But the Ninth Circuit, in response to  
11 objectors' arguments about the fee, made clear that: "On remand, we expect the  
12 district court to revisit all aspects of the award to class counsel." *Rodriguez v. West*  
13 *Publishing Corp.*, 563 F. 3d at 968.

14 Despite asking for a lodestar-based fee in accordance with the court's prior  
15 order, class counsel have not submitted time records. But the party petitioning for  
16 attorneys' fees "bears the burden of submitting detailed time records justifying the  
17 hours claimed to have been expended." *In re Washington Public Power Supply Sys.*  
18 *Lit.*, 19 F.3d 1291, 1306 (9th Cir. 1994), quoting *Chalmers v. City of Los Angeles*, 796  
19 F.2d 1205, 1210 (9th Cir. 1986). Attorneys "who fail to meet that burden do so at  
20 their own risk," *In re Equity Funding West Corp. of America Securities Litigation*, 438  
21 F.Supp. 1303, 1327 (C.D.Cal. 1977), because the absence of such records militates for  
22 a substantial reduction in fees awarded.<sup>6</sup>

23 Even if this court determines not to follow *Image Tech* and eliminate McGuire  
24 Woods' lodestar entirely from the fee calculation, the class will be financially harmed  
25 if it is caused to pay a lodestar and multiplier for time expended by all plaintiffs' firms  
26

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27 <sup>6</sup> See also *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984) ("the  
28 absence of detailed contemporaneous time records, except in extraordinary circumstances, will call  
for a substantial reduction in any award or, in egregious cases, disallowance.").

1 related to the conflicts of interest and other ethical breaches. And that time is  
2 apparently considerable, as discussed more fully below. However, it is not possible  
3 from the current record to calculate or even estimate it accurately, because class  
4 counsel have not provided sufficiently detailed accounts of the time comprising their  
5 lodestar. The Head/Schneider Objectors acknowledge that this Court has apparently  
6 declined to require such a submission from class counsel.<sup>7</sup> However, they  
7 respectfully urge the court to reconsider and to require the production of such records,  
8 and to eliminate from the lodestar any time expended in connection with the conflicts  
9 of interest and other ethical breaches.

10 Another reason that the Court should require detailed billing records is found in  
11 the information Class Counsel has submitted thus far between two attempts at  
12 securing their fee. As discussed below, a surprisingly large portion of the current  
13 claimed lodestar is time billed after the settlement and preliminary approval. The  
14 Head/Schneider Objectors submit that much of this time will either be subject to  
15 exclusion or should be subject to a multiplier of less than one.

16 \_\_\_\_\_  
17 <sup>7</sup> After remand, on June 12, 2009, the Head/Schneider objectors joined several other  
18 objectors in the submission of a Proposal for Addressing the Mandate of the U.S.C.A. 9th Circuit on  
19 Attorneys' fee issues. There, the objectors requested that the Court:

20 [O]rder the production of detailed time records by the firms representing the  
21 conflicted class representatives. Analysis of those records will reveal class counsel's  
22 lodestar at various stages of this litigation including at the time of the signing of the  
23 Incentive Agreements, the initial class certification order in this matter; and at the  
24 time the settlement was presented to the court for preliminary approval. Such records  
25 will permit objectors to argue cogently about time that should be excluded from the  
26 fee calculation and any multiplier applied to compensable time.

27 Schneider/Head Objectors Proposal for Addressing the Mandate of the U.S.C.A. 9<sup>th</sup> Circuit on  
28 Attorneys' Fee Issues filed June 12, 2009 at 3:18-26 (Docket No. 543).

This court, however, did not then require plaintiffs to produce time records, ruling instead at  
the June 15, 2009 hearing on the mandate:

I don't think we have to waste any more time with a lot of lawyers claiming  
fees that I can do by just looking at what the Court of Appeals has told me to look at,  
and that is to make a determination as to whether or not the attorneys' fees for the  
class counsel are proper under their – under their – my reading of their opinion.

Transcript of June 15, 2009 hearing at 7:16-22 (Docket No. 560).

1           **C. The Portion of Plaintiff’s Claimed Lodestar Billed After Appeal is**  
 2           **Facially Excessive**

3           In explaining their fee application, Plaintiffs say that since this Court’s original  
 4 fee order, the time expended by class counsel has “increased.” Plaintiffs then say that  
 5 “The majority of Class Counsel’s increase in lodestar was caused by Class Counsel’s  
 6 defense of the appeals filed by certain Objectors and by the administration of the  
 7 Settlement.” Plaintiffs Fee Memorandum at 8. Plaintiffs aver that they have spent so  
 8 much additional time that, if they are awarded 25% of the settlement fund, they will be  
 9 receiving a multiplier of 1.43 on their lodestar. *Id.*

10           In fact, a comparison between the lodestar information submitted in connection  
 11 with the original fee application<sup>8</sup> and that provided with the current fee request tells a  
 12 slightly different story – a veritable billing orgy that occurred between May 1, 2007  
 13 and September 30, 2009.

14           For example, Finkelstein Thompson LLP saw its lodestar increase from  
 15 \$629,769.00 to \$1,775,067.60, a nearly 300% increase. This came about for two  
 16 reasons. First, the firm’s time in this case increased from 1,793.80 hours to 3,559.18  
 17 an incredible 98% increase in time given that the only activity going on in this period  
 18 were the appeals. Second, the hourly rates of the attorneys primarily involved in the  
 19 case rose an average 30% over this period. A few examples are telling. Burton  
 20 Finklestein’s time increased from 32.70 hours to 185.90 hours and his hourly rate  
 21 increased from \$675/hour to \$825/hour. L. Kendall Satterfield’s time increased from  
 22 253.7 hours to 738.3 hours and his hourly rate increased from \$550/hour to \$715/hour.  
 23 Rosemary Rivas’ time increased from 305.3 hours to 862.6 hours and the hourly rate  
 24 increased from \$375/hour to \$550/hour. The present claimed lodestar of just these

25 \_\_\_\_\_  
 26           <sup>8</sup> Total lodestar breakdown by timekeeper records were originally submitted as part of  
 27 Exhibits 2, 3 and 4 to the May 7, 2007 Declaration of Sidney K. Kanazawa in Support of Class  
 28 Counsel’s Motion for Award of Attorneys’ Fees and Reimbursement of Expenses, Document No.  
 279 at pp 106 (McGuire Woods LLP), 124 (Finkelstein Thompson LLP), and 147 (Zwerling  
 Schachter & Zwerling, LLP).

1 three lawyers, \$1,155,672, is nearly twice the lodestar of the entire firm when it  
2 reported time in 2007. Compare Declaration of Rosemary Rivas, Exhibit B attached  
3 as Exhibit 9 to the Declaration of Sidney Kanazawa in Support of The Motion (Doc.  
4 No. 585-4, p. 23) with Document No. 279 at 124 (Exhibit 3 to May 7, 2007 Kanazawa  
5 Decl.)

6 Similarly, the firm of Zwerling, Schacter & Zwerling, LLP saw its time in this  
7 case grow from 1,451 hours to 3,196 hours and its lodestar increase from \$792,414.50  
8 to \$1,701,896. The total lodestar of the firm's top three billers in this matter, Robert  
9 Schacter, Dan Drachler and Paul Kleidman totals \$1,591,343 – over twice the 2007  
10 lodestar for the entire firm. Compare Declaration of Dan Drachler, Exhibit 2 attached  
11 as Exhibit 10 to the Declaration of Sidney Kanazawa in Support of The Motion (Doc.  
12 No. 585-4, p. 58) with Document No. 279 at 147 (Exhibit 4 to the May 7, 2007  
13 Kanazawa Decl.)

14 As a result of the unrestrained billing in this matter since April 2007, the total  
15 lodestar claimed in this case has increased from \$5,477,744 to \$8,873,517 – an  
16 increase of over 60%. This increase in the lodestar occurred at a time when the only  
17 activity in this case consisted of defending the appeal from the settlement (which  
18 involved a mediation, a responding brief, and an oral argument) and “administering”  
19 the settlement, which was also being administered by Rust Consulting, Inc. which  
20 itself has put in a claim for the balance of its fees – \$252,236.64.

21 It is inconceivable that the majority of this time was of great benefit to the class,  
22 and it should certainly not be compensated with a multiplier. At a bare minimum, the  
23 surprising increase in the lodestar, the radical retroactive rate increases for the lawyers  
24 of the Finkelstein, Thompson firm, and the necessity for devoting so many senior  
25 lawyers' time to the case after May of 2007, should be the subject of inquiry by this  
26 Court and much greater explanation by the lawyers seeking payment from the class  
27 fund.

28

1 **III. CONCLUSION**

2 The approval of Plaintiffs’ fee application as requested would be an  
3 endorsement of the practice of a creating and then failing to disclose an actual conflict  
4 of interest in a class action, continuing to represent the class despite the conflict. In  
5 this case, the McGuire Woods firm did not have a right to be involved in the case in  
6 the face of the conflict. The failure to disclose the agreement to the Court thus  
7 prolonged McGuire Woods’ work on the case and permitted it to bill time – and now  
8 claim payment for it – notwithstanding its conflicted status. McGuire Woods was not  
9 entitled to do that; the refusal to award fees would not be an inequitable “forfeiture”  
10 but is instead the only possible way to vindicate the breach of the rule against  
11 concurrently representing conflicting interests.

12 Regardless, the hours billed in dealing with the consequences of the conflict and  
13 other ethical breaches should in no circumstance be billed to the class or recovered by  
14 class counsel. Plaintiffs nevertheless have failed to provide a description of the time  
15 spent sufficient to carve out uncompensable time. Upon the present record, the  
16 motion should be denied in its entirety until Plaintiffs provide sufficient information  
17 to make that evaluation.

18  
19 Dated: October 19, 2009

KENDRICK & NUTLEY

20  
21 By: /s/ C. Benjamin Nutley

22 C. Benjamin Nutley

23 Attorneys for Objecting Class Members  
24 George Schneider, Jonathan M. Slomba,  
25 James Puntumapanitch, Justin Head and  
26 Ryan Helfrich  
27  
28