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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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RYAN RODRIGUEZ, REENA B. FRAILICH, LOREDANA NESCI, JENNIFER BRAZEAL, and LISA GINTZ, on behalf of themselves and all others similarly situated,	:	CASE NO. CV-05-3222 R(MC _x)
	:	
Plaintiffs,	:	<u>OPPOSITION TO MOTION FOR</u>
	:	<u>ATTORNEY'S FEES AND</u>
	:	<u>AWARDS TO SOME</u>
	:	<u>OBJECTORS</u>
v.	:	
WEST PUBLISHING CORP., a Minnesota corp. d/b/a BAR/BRI, and KAPLAN, INC., a Delaware corp.,	:	Date: November 2, 2009
	:	Time: 10:00 am
	:	Courtroom: 8
	:	Judge: Hon. Manuel Real
Defendants	:	

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.....16
Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009).....passim

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1 Robert J. Gaudet, Jr. and Sandeep Gopalan hereby submit their partial
2 opposition to Class Counsel’s motion for attorney’s fees styled as “Settling Class
3 Plaintiffs’ Notice of Motion and Motion for Distribution of the Net Settlement Fund
4 Upon the Occurrence of the Effective Date and For Approval and Distribution of
5 Attorneys’ Fees and Expenses” which was filed on October 9, 2009 (Dkt. 582)
6 (hereinafter, “Motion”); the accompanying “Memorandum of Points and Authorities
7 In Support of Settling Class Plaintiffs’ Motion for Distribution of the Net Settlement
8 Fund Upon the Occurrence of the Effective Date and for Approval and Distribution
9 of Attorneys’ Fees and Expenses” which was filed on October 9, 2009 (Dkt. 583)
10 (hereinafter “Memorandum”); and the accompanying “[Proposed] Order Granting
11 Settling Class Plaintiffs’ Motion for Distribution of Net Settlement Fund Upon the
12 Occurrence of the Effective Date and for Approval and Distribution of Attorneys’
13 Fees and Expenses” which was filed on October 9, 2009 (Dkt. 587) (hereinafter
14 “Proposed Order”). We submit these objections under Fed. R. Civ. P. 23(h)(2) (“A
15 class member, or a party from whom payment is sought, may object to the motion
16 [for attorney’s fees]”).

22 FACTS

23 On April 23, 2009, the U.S. Court of Appeals for the Ninth Circuit entered its
24 decision, *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009),
25 reversing this Court’s original award of attorney’s fees. *Id.* at 968-9. The Ninth
26 Circuit also ordered this Court to look at the impact that the improper incentive
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1 agreements between Class Counsel and some Class Representatives have on the
2 attorney's fee award. Specifically, the Ninth Circuit ordered this Court to consider
3 "the effect, if any, of the conflict arising out of the incentive agreements on the
4 request by class counsel for an attorney's fee award". *Id.* at 968-9. The Ninth Circuit
5 held this Court has a *mandatory* obligation to "revisit[]" the interplay between the
6 incentive agreements and attorney's fees:
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9 Finally, we believe that the incentive agreements may have an effect on
10 attorney's fees that the district court did not acknowledge. It gave no
11 weight to the Objectors' role in securing denial of incentive awards, nor
12 did the court take into account ethics concerns arising out of the
13 incentive agreements when it awarded attorney's fees to class counsel.
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15 Both issues need to be revisited.

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17 *Rodriguez*, 563 F.3d at 955. The Ninth Circuit expressly "reverse[d] the orders
18 denying any fee award to Objectors and granting the fee award to class counsel, and
19 remand[ed]" for further findings and consideration. *Rodriguez*, 563 F.3d at 955. The
20 Ninth Circuit also required this Court to determine a "reasonable amount [of
21 attorneys fees for Objectors' counsel] given their contribution to the denial of the
22 requests for incentive awards." *Id.*; *see also id.* at 955, 961.
23

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25 On August 7, 2009, this Court awarded \$8,125 to lawyers for the
26 Schneider/Head Objectors; \$8,125 to the lawyers for the Feldman objectors; and
27 nothing to the other objectors' lawyers or to parties seeking an equitable award such
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1 as Msrs. Gaudet, Gopalan, and Boggio and Mrs. De Long. Dkt. 563, 2; Dkt. 585-3,
2 10. Appeals were filed by Mr. Nutley as to the amount of the fee awarded to him and
3 by Mr. Gaudet as to this Court's denial of his request for an equitable award. These
4 appeals are currently pending before the Ninth Circuit.

5
6 On October 9, 2009, Class Counsel filed the Motion, accompanying
7 Memorandum, and Proposed Order. The Motion and Memorandum essentially
8 requested three things: (1) disbursement of the settlement fund to class members; (2)
9 re-affirmation of class counsel's prior fee award (although reversed by the Ninth
10 Circuit) and an increase in the fee award for time spent on the appeals and
11 disbursement matters; and (3) an award of thousands of dollars to some objectors or
12 their lawyers. Motion, 1-2; Memorandum, 1, 4-8, 13, 14; Proposed Order, 3-4.

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15 First, Class Counsel asked for disbursement of settlement funds to class
16 members. Motion, 2. We do not contest this point.

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18 Second, Class Counsel asked this Court for \$12,725,016 in attorney's fees
19 (Proposed Order, 2, 4; Memorandum, 13) and \$1,637,240 in expenses (Proposed
20 Order, 2, 4) and to thereby "reaffirm its award of attorneys fees and expenses for
21 Class Counsel." Motion, 7; *see also* Memorandum, 1 (requesting affirmation of
22 "Class Counsel's original award of attorneys' fees and expenses"). Despite the
23 wording of Class Counsel's request to "reaffirm" the same award, Class Counsel
24 actually asked the Court to grant **\$475,017 more** in fees than originally awarded by
25 this Court prior to the Ninth Circuit's reversal. Specifically, post-appeal, Class
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1 Counsel asked for 25% of \$50,900,067 or \$12,725,017. Motion, 7-8; *see also*
2 Proposed Order, 2, 4. The original amount awarded was the lodestar on the
3 “Effective Date” enhanced by a multiplier of 1.75 with a total amount not to exceed
4 25 percent of the “Gross Settlement Fund” on the Effective Date. Dkt. 585-2, 31.
5 The “Effective Date” is the date when all appeals on attorney’s fees, the fund, and
6 expenses are concluded. Dkt. 585, 46, 62. Since the “Gross Settlement Fund” was
7 \$49,000,000 (Dkt. 585-2, 43), at the time of this Court’s original fee award, the
8 attorney’s fee award would have been \$12,250,000.
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11 Third, Class Counsel requested payments to objector class members
12 represented by Msrs. Davis and Nutley – but not to other class members – through
13 peculiar wording in the Proposed Order:
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15 ORDERED, that the objectors represented by John William Davis, are
16 granted \$8,125.00, and that the objectors represented by C. Benjamin
17 Nutley, are granted \$8,125.00, for a total award of \$16,250.00, to be
18 paid from the Gross Settlement Fund.
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21 Proposed Order, 4. If signed by the Court, the Proposed Order would grant
22 payments to the objector class members represented by Davis and Nutley. By
23 contrast, Class Counsel’s memorandum of law requested “distribution of *attorneys’*
24 fees to certain Objectors from the Gross Settlement Fund in accordance with the
25 Court’s August 7, 2009 Order upon the Effective Date of the Settlement.”
26 Memorandum, 1 (emphasis added).
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1 On October 9, 2009, Class Counsel filed the Declaration of Sidney K.
2 Kanazawa In Support of Settling Class Plaintiffs’ Notice of Motion and Motion for
3 Distribution of the Net Settlement Fund Upon the Occurrence of the Effective Date
4 and For Approval and Distribution of Attorneys’ Fees and Expenses (Dkt. 585)
5 (hereinafter “Kanazawa Declaration”). Class Counsel also filed on October 12, 2009
6 a Notice of Errata Re Document 585-3, Declaration of Sidney K. Kanazawa in
7 Support of Settling Class Plaintiffs’ Notice of Motion and Motion for Distribution of
8 the Net Settlement Fund Upon the Occurrence of the Effective Date and for Approval
9 and Distribution of Attorneys’ Fees and Expenses (Dkt. 589) (hereinafter “Kanazawa
10 Errata”) in which they provided an additional break-down of the hours worked by all
11 three law firms that consist of Class Counsel as of August, 2009. The Kanazawa
12 Declaration and its exhibits provided the hours, billable rates, and expenses for each
13 law firm performing services as Class Counsel, allowing for an easy separation of
14 hours expended by McGuireWoods LLP apart from the other two law firms.
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20 **ARGUMENT**

21 **I. Class Counsel’s Fee Award Must Be Reduced to \$6,084,685.30 or Less Due**
22 **to Substantiated Conflicts of Interest.**

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24 **A. Because McGuireWoods LLP Has Conflicts of Interest, It May Not**
25 **Receive Any Attorney’s Fees.**

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27 This Court must reduce Class Counsel’s attorney’s fee award to \$6,084,685.30
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1 and, thereby, eliminate any compensation for McGuireWoods LLP due to its conflict
2 of interest over the duration of this litigation. *Blecher & Collins P.C. v. Northwest*
3 *Airlines, Inc.*, 858 F.Supp. 1442, 1457 (C.D. Cal. 1994) (“In California, an attorney’s
4 claim for fees may not be allowed if it is established that he or she undertook the
5 representation of conflicting interests without the written consent of both parties”) (internal quotes and brackets omitted) (quoting another case); *id.* at 1461; *Apple*
6 *Computer Inc. v. Superior Court of Los Angeles County*, 126 Cal.App.4th 1253, 1274
7 n.7 (Cal. Ct. App. 2005) (“Unidentified class members cannot waive a potential
8 conflict of interest”).¹ The Ninth Circuit wrote:

13 Simultaneous representation of clients with conflicting interests (and
14 without written informed consent) is an automatic ethics violation in
15 California and grounds for disqualification. An attorney cannot recover
16 fees for such conflicting representation, because “payment is not due
17 for services not properly performed.” This applies even where, as here,
18 the matters in which the firm represents the clients with conflicting
19 interests are unrelated. An attorney may claim fees only for services

23 ¹ *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, 52 Cal.App.4th 1, *14-16; 60
24 Cal.Rptr.2d 207, 215-216 (Cal. Ct. App. 1997); *A.I. Credit Corp., Inc. v. Aguilar &*
25 *Sebastinelli*, 6 Cal.Rptr.3d 813, 819; 113 Cal.App.4th 1072, 1079 (Cal. Ct. App. 2003)
26 (“an attorney disqualified for violating an ethical obligation is not entitled to fees”); 6
27 Cal.Rptr.3d at 817 (“It is settled in California that an attorney may not recover for
28 services rendered if those services are rendered in contradiction to the requirements
of professional responsibility ... A court may prevent counsel’s recovery of fees from
the client where the attorney has violated ethical rules”) (internal marks omitted).

1 provided before the conflict arose and the ethical breach occurred. The
2 district court awarded fees because Coudert's disqualification was
3 prospective only. But Coudert's ineligibility to recover fees was not
4 prospective. Under California law the bar to compensation extended
5 back to the beginning of Coudert's representation. Coudert represented
6 Kodak throughout its representation of Image Tech, so there was never
7 a time when the representation was conflict-free.
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10 *Image Technical Service, Inc. v. Eastman Kodak, Co.*, 136 F.3d 1354, 1358 (9th Cir.
11 1998) (case citations omitted). In the present case, the breach is even more egregious
12 since McGuireWoods LLP provided legal services with a conflict of interest in the
13 *same* matter involving parties with conflicting interests, i.e., purported class
14 representatives with an interest in incentive fee awards and absent Class members
15 with an interest in the highest possible Class settlement fund. Like Coudert Brothers
16 in *Image Technical Service*, McGuireWoods LLP may not recover a dime because its
17 conflicts occurred from the start of representation. Simply re-affirming the previous
18 attorney's fee award will not do where, as here, the Ninth Circuit has ordered this
19 Court to "revisit[]" the issue. *Rodriguez*, 563 F.3d at 955. The Ninth Circuit's
20 command is for this Court to *reduce* the attorney's fees award in light of the Ninth
21 Circuit's guidance that Class Counsel may not be compensated for work done under
22 an unethical legal services contract.
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27 Because this Court may only award "reasonable attorney fees and non-taxable
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1 costs authorized by law” under Fed. R. Civ. P. 23(h) and because the fees sought by
2 McGuireWoods LLP are neither reasonable nor permissible under California law, the
3 pending Motion must be denied. McGuireWoods LLP has conflicts of interest due to
4 an improper Incentive Agreement with its clients, as recognized by this Court which
5 noted the agreements “run afoul of the California Rules of Professional Conduct.”
6 See Dkt. 585-2, 62-63. This Court noted that the Incentive Agreement between
7 McGuireWoods LLP and its clients violated no less than three ethical rules, namely,
8 California Rules of Professional Conduct 2-200 (Financial Arrangements Among
9 Lawyers), 1-320 (Financial Arrangements with Non-Lawyers), and 1-400 (Client
10 Solicitation). See Dkt. 585-2, 66-67. In addition, McGuireWoods LLP appears to
11 have violated a fourth ethical rule, namely, California Rule of Professional Conduct
12 3-310(B)(3) and 3-310(C)(1)-(2) (Avoiding the Representation of Adverse Interests).
13 This Court found McGuireWoods LLP’s request for incentive fees “disingenuous”
14 and “improper” in violation of Rule 11. See Dkt. 585-2, 63.

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McGuireWood LLP’s conflicts are actual and substantive. To paraphrase a
discussion in *American Airlines, Inc., v. Sheppard, Mullin, Richter & Hampton*, 96
Cal.App.4th 1017; 117 Cal.Rptr.2d 685 (Cal. Ct. App. 2002), the Incentive Agreement
in this case “presented a conflicted between the fiduciary duties owed to [the class]
and those owed to [class representatives].” *Id.* at 1034. McGuireWoods LLP’s
Incentive Agreement “placed [McGuireWoods LLP] in a position of trust where
[they] could be compelled to choose which of two conflicting loyalties [they] would

1 honor.” *Id.* Here, the conflict was not a potential issue that “could” arise but it was
2 an actual conflict that compelled McGuireWoods LLP to honor its commitment to the
3 class representatives over its conflicting loyalty to absent class members. In such a
4 case, it is not possible for absent class members to concede to the representation or
5 otherwise waive their rights to uncompromised representation under Fed. R. Civ. P.
6 23(a)(4) (class representatives) and Fed. R. Civ. P. 23(g) (class counsel). *See Apple*,
7 126 Cal.App.4th at 1274 n.7 (“Unidentified class members cannot waive a potential
8 conflict of interest”) (quoting *Cal Pak Delivery*, 60 Cal.Rptr.2d at 207).

11 Binding legal precedents clearly state that California lawyers working under an
12 ethical conflict, like McGuireWoods LLP, are not entitled to fees in any amount for
13 work performed under an illegal contract. *See A.I. Credit Corp.*, 113 Cal.App.4th at
14 1080 (“it is enough to say that courts do not sit to give effect to illegal contracts. The
15 law is not to be subsidized to overthrow itself”) (internal marks omitted) (quoting
16 another case). In short, neither McGuireWoods LLP nor any of its lawyers may be
17 awarded attorney’s fees by this Court. All five of the class representatives with the
18 unethical Incentive Agreement were represented solely by McGuireWoods LLP, as
19 conceded by Mr. Kanazawa of McGuireWoods LLP: “I am ... counsel of record for
20 Plaintiffs Ryan Rodriguez, Reena B. Frailich, Loredana Nesci, Jennifer Brazeal, Lisa
21 Gintz, and Lead Class Counsel in the above-entitled action.” Kanazawa Declaration,
22 2. The Class Representatives represented by McGuireWoods LLP were (and are) the
23 five conflicted Class Representatives who, in actuality, may not serve as Class
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1 Representatives at all since they do not meet the basic qualifications of Fed. R. Civ.
2 P. 23(a)(4).

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4 **B. Because Only The Finkelstein and Zwerling Firms Are Entitled to**
5 **Attorney's Fees, the Award Should Be Calculated On the Basis of**
6 **Their Lodestars.**

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8 This Court should calculate a new fee award by reference to the lodestar – not
9 through the percentage of common fund method – because only the lodestar will
10 allow for a sensible reduction of attorney's fees based on McGuireWood LLP's
11 conflicted role. The number of hours expended by lawyers at McGuireWoods LLP
12 and its predecessor firm amount to 20,540 hours with an alleged lodestar of
13 \$5,396,554.15. See Dkt. 585, 14. The collective lodestar that Class Counsel (all 3
14 firms) claimed to have earned on this case amounts to \$8,873,517.75. Memorandum,
15 8. Subtracting the lodestar of McGuireWoods LLP from the collective lodestar, we
16 arrive at a lodestar of \$3,476,963.60 for the Finkelstein firm and the Zwerling firm.
17 When multiplied by 1.75 (the same multiplier used previously by this Court), the total
18 permissible payment for Class Counsel reaches **\$6,084,686.30**. This payment must
19 go solely to the two law firms without ethical conflicts.

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21 Only the hours expended by the two law firms without conflicts – Finkelstein
22 Thompson LLP and Zwerling Schachter & Zwerling – may form the basis for any
23 attorney's fee award to Class Counsel. Of course, even those hours must be
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1 scrutinized. The billable hours of these two law firms are set out, respectively, in the
2 Kanazawa Declaration as Exhibits 9 and 10. The Finkelstein firm billed 3,559.18
3 hours for a lodestar of \$1,775,067.60. Dkt. 585-4, 4, 23. The Zwerling firm reported
4 3,196.3 hours for this litigation and a lodestar of \$1,701,896.00. Dkt. 585-4, 28, 58.
5 The combined lodestar of the two firms is \$3,476,963.60 and, if multiplied by 1.75
6 (the multiplier for risk used in the Court’s original order approving the fee award), it
7 amounts to \$6,084,686.30 in attorney’s fees, as noted above. This is the proper
8 starting point for an attorney’s fee award to Class Counsel. The Court may need to
9 make further deductions, e.g., for hours spent on the Ninth Circuit appeal which Class
10 Counsel partially lost. The combined expenses for these two firms is ***\$153,497.34 in***
11 ***expenses*** which is also a starting point for the Court’s consideration of an award of
12 expenses. See Dkt. 585-4, 4-5 (\$118,259.86 incurred by Finkelstein firm); *id.* at 28
13 (\$35,237.48 incurred by Zwerling firm). However, these expenses should be reduced
14 since the Finkelstein firm cannot recover \$82,452.69 in “Legal Research” costs (Dkt.
15 585-4, 4) when they most likely paid monthly rates for legal research services that
16 were used for other clients on other cases. The Class should not bear the costs of
17 legal research fees that are doubly or triply billed to other clients.

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24 This Court must make findings as to the scope and impact of the incentive
25 agreements; determine which members of Class Counsel bore ethical conflicts; make
26 findings as to the validity of the legal research and other expenses; and lower the
27 attorney’s fees of the conflicted lawyers in accordance with its findings. Since Class
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1 Representatives Brewer and Rimson do not have conflicts of interest, as far as we
2 know, their lawyers should be entitled to an attorney's fee award. Brewer and
3 Rimson's lawyers filed their initial lawsuit without the representation of
4 McGuireWoods LLP. Kanazawa Declaration, 4. The Court should investigate, and
5 make findings as to, whether the Finkelstein and Zwerling firms had any conflicts of
6 their own due to an improper Incentive Agreement, e.g., with purported class
7 representative Brazeal. McGuireWoods LLP (representing Nesci and Gintz) and, to
8 some extent, the law firm that represented Brazeal cannot be rewarded for securing
9 their place in this litigation through unethical tactics. *See* Dkt. 585-2, 70 ("it appears
10 as if Plaintiffs Brazeal, Nesci, and Gintz were recruited into the lawsuit by Class
11 Counsel with the promise of incentive awards") (implicitly invoking lawyers
12 representing these three parties). The Ninth Circuit spotlighted the parties of interest:

17 It turns out that, as part of their retainer agreement, the named plaintiffs
18 in *Rodriguez* (Rodriguez, Frailich, Nesci, Brazeal, and Gintz) had
19 entered into an incentive arrangement with Van Etten Suzumoto &
20 Becker, which preceded McGuireWoods LLP. The incentive
21 agreements obligated class counsel to seek payment for each of these
22 five in an amount that slid with the end settlement or verdict amount: if
23 the amount were greater than or equal to \$500,000, class counsel would
24 seek a \$10,000 award for each of them; if it were \$1.5 million or more,
25 counsel would seek a \$25,000 award; if it were \$5 million or more,
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1 counsel would seek \$50,000; and if it were \$10 million or more,
2 counsel would seek \$75,000. Neither Brewer nor Rimson, the other
3 two class representatives, was a party to an incentive agreement. They
4 were separately represented, by Finkelstein Thompson LLP, and
5 Zwerling, Schachter & Zwerling, LLP.
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7 *Rodriguez*, 563 F.3d at 957. In this clear light, the Ninth Circuit found that
8 McGuireWoods LLP, as successor to Van Etten Suzumoto & Becker, had genuine
9 conflicts between its demanding clients and the absent Class members. The conflict
10 eventually became known to this Court. *See* Dkt. 585-2, 40-41. McGuireWoods
11 LLP has conceded its conflict of interest: “McGuireWoods LLP filed a motion to
12 withdraw as counsel of record for Plaintiffs Gintz, Nesci and Rodriguez based on a
13 conflict of interest.” *See* Kanazawa Declaration, 11. Their attempt to withdraw did
14 not, however, remedy the conflict or somehow make the firm eligible for fees. The
15 rule stated by California courts is that “a lawyer may not avoid breaching the duty of
16 loyalty which the concurrent representation rule is designed to avoid by unilaterally
17 converting a present client into a former client. In fact, such conversion may itself be
18 a breach of loyalty.” *American Airlines*, 96 Cal.App.4th at 1037.
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23 Surprisingly, as if the Ninth Circuit had never issued a binding decision, Class
24 Counsel has just requested ***\$475,017 more*** than previously awarded by this Court in
25 an order that was later reversed on appeal. Class Counsel has attempted to justify this
26 increase over the original award due to time spent in “defense of the appeals filed by
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1 certain Objectors.” Memorandum, 8 n.11. Hence, Class Counsel would like to get
2 paid for time they took to preserve their original fee award, on appeal, even though
3 their position was reversed by the Ninth Circuit. McGuireWoods LLP asserted that
4 its expenses amount to \$1,484,399.37 but this figure includes an objectionable and
5 unnecessary \$40,860.40” in “Miscellaneous/Other” costs and \$76,230.13 in non-
6 reimbursable “Computer Research” costs that are generally a natural part of a law
7 firm’s overhead and subject to monthly rates of hire rather than case-specific
8 expenditures. Dkt. 585-3, 14-15. Both expenses must be rejected. Indeed, Class
9 Counsel could be legally liable if they overbill the Class for legal research or other
10 expenses. *See generally* Erik Sherman, *Law Firms Allegedly Overcharging for*
11 *Online Legal Research*, BNET, May 14, 2009 (“The class action was filed earlier this
12 month in California Superior Court, lead plaintiff being J. Virgil Waggoner, against
13 international law firm Chadbourne & Park LLP. The charge is that the firm
14 overbilled for legal research. According to the complaint, Waggoner was billed about
15 \$20,191.64 for online legal research, but that the firm’s billing practices for
16 computerized legal research were ‘deceptive’ because Chadbourne did not reveal that
17 it billed out more for research expenses than it spent.”).

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24 **C. McGuireWoods LLP Must Be Disqualified From Further Serving as**
25 **Class Counsel.**

26 Due to McGuireWoods LLP’s conflicts of interest, the Court must not only
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1 reject any attorney's fees for McGuireWood LLP but it must disqualify the firm from
2 continuing to serve as Class Counsel. *See* Fed. R. Civ. P. 23(g)(1)(B), (g)(1)(C)(iv);
3 *Cal Pak Delivery*, 52 Cal.App.4th at *9-10; 60 Cal.Rptr.2d at 211-212 (noting court
4 has inherent and statutory powers under Code of Civil Procedure § 128 to disqualify
5 class counsel due to conflict of interest). Any attempt by this Court to maintain
6 McGuireWoods LLP as Class Counsel or otherwise compensate the law firm for its
7 work on this case would be reversible error, as stated by a California Court of
8 Appeal:
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11 We conclude that the trial court abused its discretion in denying the
12 motion to disqualify the firms [from acting as class counsel] because an
13 insurmountable conflict of interest exists between the class
14 representative and class counsel, on one hand, and the putative class, on
15 the other hand.
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18 *Apple*, 126 Cal.App.4th at 1261. Although no motion to disqualify is currently
19 pending, the matter is properly before the Court and it may be adjudged on the basis
20 of the Court's inherent power. McGuireWoods LLP should be prohibited from filing
21 additional motions on behalf of the Class or acting in any way in the role of Class
22 Counsel. The federal rules expressly permit this Court to modify its prior order
23 appointing McGuireWoods LLP as co-lead counsel. *See* Fed. R. Civ. P.
24 23(g)(1)(C)(iv) (“...may make further orders in connection with the appointment”);
25 Fed. R. Civ. P. 23(g)(1)(B) (court must confirm that “[a]n attorney appointed to serve
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1 as class counsel must fairly and adequately represent the interests of the class”).

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4 **D. Class Counsel’s Self-Serving Statements Are Contradicted By The**
5 **Court’s Previous Findings and Binding Legal Precedent.**

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7 To support their request for *more* attorney’s fees than previously awarded by
8 this Court, Class Counsel have cited case law suggesting that an attorney may receive
9 a fee even if she has a conflict of interest. However, the cases cited by Class Counsel
10 are distinct in that they involve cases where the conflict was speculative, uncertain, or
11 otherwise unsubstantiated. Memorandum, 11-13. Here, by contrast, the conflict is
12 well established and undisputed. Unlike the case of *Pringle v. La Chapelle*, 73
13 Cal.App.4th 1000, 87 Cal.Rptr.2d 90 (Cal. Ct. App. 1999) (cited in Memorandum, 11,
14 13), the ethical breach in the present case “was no mere technical violation of ethical
15 rules asserted after the fact.” *A.I. Credit Corp.*, 6 Cal.Rptr.3d at 819(distinguishing
16 *Pringle*). In the present action, this Court made specific findings as to the scope and
17 gravity of the conflict. Now, under the Ninth Circuit’s mandate, this substantiated
18 conflict must affect the attorneys’ fee award. It is not true – or even arguable – that
19 “some commentators have opined that such [incentive award] agreements might be
20 acceptable.” Memorandum, 12. The source cited by Class Counsel is nothing more
21 than a law review article that said an agreement in which class counsel agreed to seek
22 an incentive award – without any specified amount– “might be acceptable.” Dkt.
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1 585-2, 63. In the words of the original source:

2 While the plaintiff's attorney cannot promise the plaintiff an award in
3 advance, there would seem to be no reason to question the attorney's
4 commitment in the initial engagement agreement to request an
5 incentive award if the primary claim is successful.
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7 Dkt. 585-2, 63 (quoting Clinton A. Krislov, *Scrutiny of the Bounty. Incentive*
8 *Awards for Plaintiffs in Class Litig.*, 78 ILL. B.J. 286, 290 (1990)). The law review
9 article echoes the rule that "the plaintiff's attorney cannot promise the plaintiff an
10 award in advance" which is precisely what happened here. Class Counsel promised
11 to seek specific awards under certain conditions that were written into the Incentive
12 Agreement. This is not a case where Class Counsel generally promised to seek an
13 unspecified award from the Court. Quite differently, this case involved a promise to
14 seek \$10,000 per class representative if the settlement were \$500,000 or more;
15 \$25,000 each if the settlement were \$1.5 million or more; \$50,000 each if the
16 settlement were \$5 million or more; and \$75,000 each if the settlement were \$10
17 million or more. *See* Dkt. 585-2, 41. More importantly, these amounts were not
18 revealed to this Court at class certification, or even at preliminary settlement
19 approval, and they created an obvious risk that class representatives had disaligned
20 interests from other class members. This Court made accurate findings as to the
21 nature of the agreement:
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27 [The] contract essentially aligns the financial interests of the Class
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1 Representatives and Class Counsel ... Such an agreement runs afoul of
2 the rule forbidding class counsel and class representatives from being
3 the same person or otherwise having identical interests.

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5 Dkt. 585-2, 64; *id.* at 71 (no incentive to go to trial) (“disconnect between the
6 interests of the Class Representatives and the unnamed Class Members, and a
7 consequent conflict of interests”). This Court made other findings as to the severity
8 of the conflict. This Court noted: the “Class was never advised of the Incentive
9 Agreement” and this Court discovered the agreement “only after the Preliminary
10 Approval Hearing.” Dkt. 585-2, 41, 71. Consistent with its obligations under the
11 unethical Incentive Agreement, McGuireWoods LLP sought \$75,000 each for
12 Rodriguez, Nesci, and Gintz. *See* Dkt. 585-2, 42. This Court held that such
13 agreements actually “created” a genuine – not speculative – “conflict of interests ...
14 between the Class Representatives and the Class Members.” *See* Dkt. 585-2, 42; *see*
15 *also* Dkt. 585-2, 72 (“The conflict of interests here was not simply potential. Indeed,
16 in this case there was an actual manifestation of conflicting interest”).
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21 It is puzzling, to say the least, that Class Counsel has characterized the legal
22 representation agreements as items that “did not violate any existing authority and
23 were supported by some legal commentary.” Memorandum, 12. Class Counsel
24 failed to cite a single legal precedent or rule supporting their shocking assertion.
25 Their claim is not only a gross exaggeration but it is directly misleading and
26 inaccurate for several reasons. First, as shown above, this Court already made
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1 findings and came to the opposite conclusion. Second, Class Counsel did not appeal
2 this Court’s findings that the Incentive Agreement was unethical and Class Counsel
3 “consequently cannot argue now that there was no evidence that an ethical violation
4 occurred.” *A.I. Credit Corp.*, 113 Cal.App.4th at 1077. Third, the incentive fee
5 agreements violated Fed. R. Civ. P. 23(e)(2) which reads: “The parties seeking
6 approval of a settlement ... under Rule 23(e)(1) must file a statement identifying any
7 agreement made in connection with the proposed settlement” This rule requires
8 the disclosure of any and all side agreements that might influence the creation and
9 approval of a settlement. However, the Incentive Agreement was not disclosed, as it
10 should have been, by either Class Counsel or defense counsel. Fourth, any class
11 representative incapable of providing adequate representation under Fed. R. Civ. P.
12 23(a)(4) cannot serve as a class representative and such a class action (or class
13 settlement) must be denied certification or de-certified. *See e.g. Hanlon v. Chrysler*
14 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Here, at least five class representatives
15 were inadequate due to their conflict. Controlling legal authority disallows them
16 from representing the Class. The three-judge panel of the Ninth Circuit spoke
17 clearly on this issue:

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23 We agree that the ex ante incentive agreement created conflicts among
24 the five contracting class representatives, their counsel, and the rest of
25 the class. We disapprove of them. Nevertheless, there were to other
26 class representatives who had no incentive agreements and whose
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1 separate counsel were not conflicted.

2 *Rodriguez*, 563 F.3d at 955. The Ninth Circuit confirmed without a doubt that the
3 Incentive Agreement presented an actual conflict, rendering the five clients of
4 McGuireWoods LLP as inadequate Class Representatives.
5

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7 **II. Payments to Some Objectors Must Be Denied, and Payments to Their**
8 **Lawyers Should Be Stayed Until the Conclusion of Appeals.**

9
10 There is a bit of sloppiness (or deliberate trickery) in the Memorandum and
11 Proposed Order submitted by Class Counsel. The Proposed Order attempts to award
12 thousands of dollars in payments to Objector Class Members represented by lawyers
13 Davis and Nutley via transfers from the class fund to these several objectors. *See*
14 Proposed Order, 4. The language in the Proposed Order drafted by Class Counsel
15 reads as follows:
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18 ORDERED, that the objectors represented by John William Davis, are
19 granted \$8,125.00, and that the objectors represented by C. Benjamin
20 Nutley, are granted \$8,125.00, for a total award of \$16,250.00, to be
21 paid from the Gross Settlement Fund.
22

23 Proposed Order, 4. This language would have the Court transfer money directly to
24 “the objectors represented by” lawyers Nutley and Davis. There have been no
25 motions, no adequate notice, and no justification for the payment of money directly to
26 Mssr. Davis and Nutley’s clients out of the class settlement fund. Therefore, this
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1 provision from the Proposed Order must be stricken.

2 It would be a clear error of law for this Court to award monetary payments to a
3 few objector Class members, treating them differently from other class members,
4 through payments taken out of the Class settlement fund to the detriment of the Class
5 as a whole. Evidently aware of this problem, Class Counsel elsewhere requested
6 payment to the lawyers – Nutley and Davis – rather than to their clients. Specifically,
7 Class Counsel’s memorandum of law requested “distribution of *attorneys’ fees* to
8 certain Objectors from the Gross Settlement Fund in accordance with the Court’s
9 August 7, 2009 Order upon the Effective Date of the Settlement.” Memorandum, 1
10 (emphasis added), 14. As “attorney’s fees,” this money cannot be shared by Davis
11 and Nutley with their own clients or else they would run afoul of professional rules
12 against fee-splitting. In contrast to the Proposed Order, the Memorandum states that
13 payments should be made to the *lawyers* for these objectors - i.e., to Mssr. Davis and
14 Nutley – in the form of attorney’s fees. Specifically, Class Counsel asked “that the
15 Court authorize the distribution of these *attorney fee awards* from the Net Settlement
16 Fund.” Memorandum, 14 (emphasis added).

17 To be clear, not only can these several objectors represented by Nutley and
18 Davis not receive direct payments out of the Class settlement fund, but they are not
19 entitled to any form of an “incentive award” because they do not serve as Class
20 Representatives. Even if they were so entitled, despite the lack of any legal precedent
21 to support such a right, there is no evidence that Mr. Nutley or Mr. Davis’s clients

1 have increased the value of the settlement or otherwise served the interests of the
2 class. If Class Counsel were to privately offer some sum of their own money (not
3 taken out of the class fund) to settle the claims of the Nutley or Davis clients in
4 exchange for an agreement, at this *post-settlement* stage, that Nutley or Davis will
5 withdraw their clients' objections, then it would not require this Court's approval.
6 Such "side agreements" only require Court approval if they are made prior, or
7 incidental to, a proposed and pending class settlement. *See* Fed. R. Civ. P. 23(e)(2).
8 Here, where the settlement was long ago approved and there is no evidence of any
9 prior side agreement to grease the Class settlement, this Court's approval is not
10 required for any private payment by Class Counsel to the Davis and Nutley clients. If
11 Class Counsel wishes to pay these objector class members, then it may do so directly
12 without the need to sneak language into the Proposed Order. Such a private payment
13 would not frustrate the interests of the class members (as long as it does not come out
14 of the Class settlement fund) since, in this Court's estimate (as affirmed by the Ninth
15 Circuit), the Class settlement fund is fair and adequate. Such a payoff would not
16 hinder the Class.

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22 Further, to the extent Class Counsel asked for "distribution of these attorney
23 fee awards from the Net Settlement Fund" to objectors lawyers Davis and Nutley
24 (Memorandum, 14), the amount of these awards is now on appeal to the Ninth
25 Circuit. Any decision as to the amount of fees that should be awarded to Mr. Nutley
26 and Mr. Davis should be stayed until the Ninth Circuit appeal is resolved. As a side
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1 note, it is curious that Class Counsel, rather than Davis and Nutley, are requesting
2 this disbursement, and the Court should more fully explore the motivation behind
3 Class Counsel's request.
4

5 **CONCLUSION**

6 For the reasons stated above, we request the Court to (i) lower the amount of
7 attorney's fees awarded to Class Counsel to reflect a deduction for efforts exerted by
8 McGuireWoods LLP under a conflict of interest; (ii) make any necessary or related
9 findings about how any conflicts may have affected the Finkelstein or Zwerling firms
10 and reduce their fees accordingly; (iii) deny or strike the language in the Proposed
11 Order granting payment to Davis and Nutley's clients, i.e., objector class members,
12 from the class settlement fund, and (iv) stay any decision on awards to objectors for
13 their role in reducing the incentive fee awards until such time as the Ninth Circuit has
14 decided the currently pending appeals on this issue.
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18 DATED: October 21, 2009

Respectfully submitted,

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Pro Per Objector Class Members