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

12 Additional Counsel listed on Signature Page

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 vs.

20 WEST PUBLISHING CORPORATION,
21 et al.,

22 Defendants.

23 Case No. CV 05-3222 R(Mcx)

24 JOINT RESPONSE IN OPPOSITION
25 TO CLASS COUNSEL'S REQUEST
26 FOR ATTORNEY FEES

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

Judge: Hon. Manuel J. Real

29 AND CONSOLIDATED ACTIONS

30 CERTAIN OBJECTORS JOINT RESPONSE IN OPPOSITION
31 TO CLASS COUNSEL'S REQUEST FOR ATTORNEY FEES

32 COME NOW Evans & Mullinix, P.A., Sarah Siegel, Jennifer Brown McElroy,
33 Daniel Schafer, Jason Tingle and David Oriol (together, "Objectors Evans, Siegel,
34

1 Brown, Schafer, Tingle and Oriol") and hereby oppose Class Counsel's Motion, filed
2 October 9, 2009 (Document 583), for Approval and Distribution of Attorneys' Fees,
3 stating as follows.
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5 **Award of 29% of the Settlement Fund Would be Excessive.**
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7 The Motion seeks fees of \$12,725,016 and reimbursement of expenses of
8 \$1,637,240, totaling \$14,362,256, from a \$49,000,000 Settlement Fund -- that is, the
9 Motion seeks 29.31% of the Fund. An alternate calculation does not fare much better: If
10 the accumulated interest of about \$2,000,000 is included, increasing the available Fund to
11 \$51,000,000, then the percentage is 28.16%. Notwithstanding the obvious arithmetic,
12 the Motion asserts that only 25% is requested. No matter. Each of those percentages is
13 excessive for a fund of this size, according to the well-settled case law.
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17 Courts recognize the need to review carefully the fees requested by class counsel
18 because a large, dispersed class that never entered a contract with class counsel will not
19 be able to monitor fees for themselves. *See, Rawlings v. Prudential-Bache Properties,*
20 *Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In Re General Motors Corporation Pick-Up Truck*
21 *Fuel Tank Products Liability Litigation*, 55 F.3d 768, 819-20 (3rd Cir. 1995); *Court*
22 *Awarded Attorney Fees, Report of the Third Circuit Task Force* ("Task Force Report"),
23 108 F.R.D. 237, 255 (1985).
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27 The 29% fee (with expenses) is far too high of a percentage to award from a \$49
28 million Fund. This Court must recognize that larger funds require relatively smaller

1 percentage awards, because the effort necessary to generate each dollar of the fund
2 decreases as the fund grows in size. *See, e.g., Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780
3 (6th Cir. 1996) (noting economies of scale enjoyed by the lawyers involved in large class
4 action); *In re Washington Public Power Supply Sys. Litig.*, 19 F.3d 1291, 1297 (9th Cir.
5 1994); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 350 (N.D. Ga. 1993);
6 *Lachance v. Harrington*, 965 F. Supp. 630, 649 (E.D. Pa. 1997); *Task Force Report*, 108
7 F.R.D. at 256 & n.63 (recommending that percentage of recovery fee should decrease as
8 size of common fund increases). As explained in *Domestic Air*:

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12 [W]hen the fund is extraordinarily large, the application of a normal range of
13 fee awards may result in a fee that is unreasonably large for the benefits
14 conferred. Thus, based on empirical research covering settlements as late as
15 1991, [Herbert] Newberg notes that percentage awards tend to decline as the
16 size of the recovery increases. Herbert P. Newberg, *Attorney Fee Awards* §
17 2.09 (1986). Where the fund recoveries range from \$51-\$75 million, fee
18 awards usually fall in the 13-20% range.

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20 148 F.R.D. at 350-51.

21 Numerous cases also support awarding a lower percentage fee on a fund of this
22 size. *See, e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988) (16.5%
23 award on fund of \$75 million); *Thompson v. Midwest Found. Indep. Physicians Ass'n*,
24 124 F.R.D. 154 (S.D. Ohio 1988) (5% award on fund of \$65.5 million); *In re Fine Paper*
25 *Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3rd Cir. 1984)
26 (10.8% award on fund of \$50.65 million); *In re Flight Transp. Corp. Sec. Litig.*, 685 F.
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1 Supp. 1092 (D.Minn. 1987) (15% fee on fund of \$52 million); *In re Gypsum Cases*, 386
2 F. Supp. 959 (N.D. Cal. 1974) (12.35% award on fund of \$75 million).
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4 Professor Newberg's treatise on attorney fees awards, as well as the case law cited
5 above, support a fee award in the 13-20% range on a fund of this size. Here, a reasonable
6 percentage award should be at the bottom of that range -- 13% -- to account for the fact
7 that injured Class Members are being forced to accept compensation that is far below the
8 true value of their claims. If the Court were to award the lodestar, which Class Counsel
9 claims is \$8,873,518, that percentage of a \$49,000,000 fund would be 18.1%, which is on
10 the high side of the acceptable range.
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13 **"Clear Sailing" Feature Requires Extra Scrutiny.**

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15 Additionally, the Settlement Agreement has a key feature that requires extra and
16 critical scrutiny of the request for fees. The Settlement Agreement contains a "clear
17 sailing" provision. Defendants agreed to take no adverse position regarding any
18 application by Class Counsel for attorneys' fees and costs. (Document 239, Settlement
19 Agreement). When the process for awarding attorneys' fees is non-adversarial, courts
20 must be particularly diligent in comparing the value of the settlement with the fee award.
21 *See, Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) ("We
22 believe it to be self-evident that the inclusion of a clear sailing clause in a fee application
23 should put a court on its guard, not lull it into aloofness."). Because the defendants do not
24 act as an adversary in that context, the reactions of class members (like Objectors here) to
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1 the fee award are extremely important. *Bowling*, 927 F. Supp. at 1044-45 (objector
2 provided only alternative view of the settlement because defendant failed to participate in
3 litigation about attorneys' fees).

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5 **Payment from Common Fund also Requires Heightened Scrutiny.**

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7 This Court also must carefully assess the fee award because it comes from the
8 common fund. When fees come from the common fund, class counsel's interests differ
9 significantly from those of the class. *Bowling*, 102 F.3d at 781 n.3 (noting that "[t]he risk
10 that counsel has been some way been 'bought off'" requires scrutiny at the approval stage
11 when the fee award comes from the common fund). *See also, Weinberger*, 925 F.2d at
12 524 ("[T]he conflict between a class and its attorneys may be most stark where a common
13 fund is created and the fee award comes out of, and thus directly reduces, the class
14 recovery"); *Democratic Cent. Comm. of Dist. of Columbia v. Wash. Metro. Area*
15 *Transit Comm'n*, 3 F.3d 1568, 1573 (9th Cir. 1985).

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17 "Upon settlement of a class action lawsuit, the district court has a responsibility to
18 assess the reasonableness of the requested attorneys' fees[.]" *Strong*, 173 F.R.D. at 170.
19 In evaluating the fee request, this Court must consider the benefits conferred upon the
20 class. *Id.* at 172 (citing *In re FPI/Agretech Sec. Litig.*, 105 F.3d 469, 473 (9th Cir. 1992)).

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22 As noted above, an attorneys' fee which exceeds 13%-20% of the actual value of a
23 settlement is necessarily unreasonable. *See, e.g., Taubenfeld v. AON Corp.*, 415 F.3d 597
24 (7th Cir. 2005).

1 WHEREFORE Objectors Evans, Siegel, Brown, Schafer, Tingle and Oriol hereby
2 respectfully request that this Court award attorneys fees to Class Counsel in an amount
3 which does not exceed the claimed lodestar of \$8,873,518, which would be 18% of the
4 Settlement Fund.
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6 Dated: October 19, 2009

/s/ Darrell Palmer

DARRELL PALMER

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