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Emily Grant, Jeff Lang, Sarah McDonald,  
11 Cara Patton, Rachel Schwartz, and Greg Thomas

12  
13 UNITED STATES DISTRICT COURT  
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
15

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

20 Plaintiffs,

21 v.

22 WEST PUBLISHING COMPANY,  
23 a Minnesota Corporation d/b/a  
BAR/BRI, and KAPLAN, Inc., a  
24 Delaware Corporation

25 Defendants.  
26  
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**CASE NO. CV-05-3222 R(MC<sub>x</sub>)**

**CLASS ACTION**

**RESPONSE TO 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**

**Date: November 2, 2009**

**Time: 10:00 a.m.**

**Courtroom: 8**

1 Objectors, David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang,  
2 Sarah McDonald, Cara Patton, Rachel Schwartz, and Greg Thomas (collectively the  
3 “*Feldman Objectors*”) present the following response to the motion brought by class  
4 counsel styled as a “*Motion for Distribution of the Net Settlement Fund Upon the*  
5 *Occurrence of the Effective Date and For Approval and Distribution of Attorneys’*  
6 *Fees and Expenses.*”

8 The Feldman objectors object to an award of fees to class counsel and any  
9 subsequent distribution relating thereto. *See Image Tech. Serv. v. Eastman Kodak*  
10 *Co.*, 136 F.3d 1354 (9<sup>th</sup> Cir. 1998). The egregious and serious misconduct by class  
11 counsel in conspiring with the named class representatives to obtain unjustified pay-  
12 offs for them pursuant to a secret side deal and withholding such information from  
13 both the court and unnamed class members until the eleventh hour was incompatible  
14 with the faithful performance of their duties and requires the disallowance of  
15 attorneys fees for them. More importantly, class counsel ignored that by negotiating  
16 such agreements they created an irreconcilable conflict of interest between  
17 themselves and the unnamed class members that was not and could not be waived,  
18 thereby further requiring disallowance of any favorable fee award. *See Palumbo v.*  
19 *Tele-Communications, Inc.*, 157 F.R.D. 129 (D.D.C. 1994).

22 Class counsel’s brief primarily focuses on the so-called “*automatic forfeiture*”  
23 issue concerning its fee award in the context of the incentive agreements. The  
24 analysis largely misses or glosses over all key points dispositive to the motion.

25 As set forth in *Pringle v. La Chapelle*, 73 Cal.App.4<sup>th</sup> 1000, 1006 (1999), a  
26 proper record must be presented so the court can ascertain whether: (1) the  
27 purported violation of ethical rules was serious, (2) if any act was inconsistent with  
28

1 the character of the profession, or (3) whether there was an irreconcilable conflict  
2 created. Only with a complete record can the court properly ascertain whether the  
3 actions taken by class counsel were incompatible with the faithful discharge of their  
4 duties. The record in this regard is grossly inadequate and the court should decline  
5 an award in favor of class counsel altogether.  
6

7 The burden is on class counsel, as the moving party, to establish the propriety  
8 of any fee award. Class counsel has not met their burden, let alone even engaged it.

9 Taking the all or nothing approach, for example, no contemporaneous time  
10 records have been produced so that the timing of the irreconcilable conflict can be  
11 squared with work performed pre and post conflict, or fees properly apportioned to  
12 non-conflicted counsel, if any. This motion is largely akin to re-arranging the deck  
13 chairs on the *Titanic* and is devoid of any meaningful response to the Ninth Circuit  
14 mandate.  
15

16 The court previously made a factual finding that the class was never advised  
17 of the incentive agreements. If that were not sufficiently disappointing, this  
18 information was improperly concealed by class counsel from unnamed class  
19 members and the court. Beyond the act of willful concealment, class counsel  
20 ultimately misrepresented important aspects of the deal they had structured with the  
21 named plaintiffs. In this regard, class members had no way of knowing that the  
22 class representatives stood to reap substantial benefits far in excess of those for  
23 which they were eligible to receive. The unnamed class members were misled into  
24 believing the named representatives performed substantial services for the class  
25 justifying such awards. As it ultimately turned out, the “*services*” that the named  
26 plaintiffs purportedly performed were of little real monetary value and could not  
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1 justify an award for even a fraction of the amounts sought and/or negotiated  
2 between them and class counsel. Even those attorneys from firms not bound by the  
3 incentive agreements tried to get their named representatives on the “*gravy-train*”  
4 even though they had no contractual obligation to do so. Likewise, they failed and  
5 refused to take any meaningful steps to cure the taint associated with the named  
6 representatives. The unnamed class members were further misled into believing the  
7 settling plaintiffs vetted the proposed settlement on the merits when instead they  
8 were guided by personal monetary interests which were in stark conflict with those  
9 interests possessed by unnamed class members. Class counsel did nothing to rectify  
10 the over-reaching and, in fact, aided and abetted the named representatives by  
11 enabling their unrealistic and inappropriate expectations. Class counsel claims that  
12 class members were not damaged by their ethical breaches. For the reasons  
13 discussed *supra*, this argument is frivolous.

16       Indeed, this court previously concluded that the incentive agreements were  
17 highly improper for myriad reasons: (a) *the incentive agreement was inappropriate*  
18 *and contrary to public policy*; (b) *it led to an improper request in the district court*;  
19 (c) *it creates the appearance of impropriety*; (d) *it failed to correlate the amount*  
20 *requested to a reasonable forecast of costs or risks incurred*; (e) *it ran afoul of the*  
21 *California Rules of Professional Conduct*; (f) *it improperly encouraged figurehead*  
22 *cases and bounty payments*; and (g) *it created a conflict of interest between the*  
23 *contracting class representatives and unnamed class members*. Such findings  
24 cannot be squared with class counsel’s conclusory argument that their negotiation of  
25 the incentive agreements and the subsequent actions taken by them do not constitute  
26 egregious or serious ethical violations. It is the law of the case and class counsel did  
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28

1 not seek reconsideration.

2 As the California Supreme Court has observed: “The preservation of public  
3 trust both in the scrupulous administration of justice and in the integrity of the bar  
4 is paramount... [The client’s recognizably important right to counsel of his choice]  
5 must yield, however, to considerations of ethics which run to the very integrity of  
6 our judicial process. *Hull v. Celanese Corporation* (2d Cir. 1975) 513 F.2d 568,  
7 572.” *Comden v. Superior Court*, 20 Cal. 3d 906, 915 (1978) (emphasis added).

9 Class counsel’s decision to place the interests of the named representatives far ahead  
10 of the interests of the unnamed class members violated the integrity of the judicial  
11 process and vitiated public trust in the scrupulous administration of justice even  
12 though the court ultimately declined to issue such incentive awards. The ethical  
13 breach was serious and egregious. Moreover, by arguing that the ethical violations  
14 here were not serious or egregious, class counsel has shown little remorse and has  
15 taken no responsibility for their transgressions which violated public trust in the  
16 judicial system. To award the requested fees now only serves to compound the  
17 ethical violations which should not have occurred in the first place.

19 The Ninth Circuit has concluded that “California courts have often held that  
20 when the ethical violation in question is a conflict of interest between the attorney  
21 and the client (or between the attorney and a former client), the appropriate fee for  
22 the attorney is zero. At least that is true when the violation is one that pervades the  
23 whole relationship. See, e.g., *Clark v. Millsap*, 197 Cal. 765, 785, 242 P. 918, 926  
24 (1926) (relationship permeated with fraud after gaining control of client’s assets; no  
25 attorneys’ fee proper); *Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1162, 217 Cal.  
26 Rptr. 89, 113 (1985) (no finding on reasonable value of attorneys’ services

1 *necessary because conflict of interest rendered services valueless), cert. denied, 475*  
2 *U.S. 1048, 106 S. Ct. 1267, 89 L. Ed. 2d 576 (1986); Jeffry v. Pounds, 67 Cal. App.*  
3 *3d 6, 12, 136 Cal. Rptr. 373, 377 (1977) (law firm entitled to compensation only for*  
4 *services it rendered prior to its breach of professional conduct by accepting*  
5 *representation of client's wife in marital dispute without the client's consent);*  
6 *Goldstein v. Lees, 46 Cal. App. 3d 614, 617-18, 120 Cal. Rptr. 253, 254-55 (1975)*  
7 *(attorney who undertook to represent a client in a proxy fight with a corporation for*  
8 *which the attorney had been general counsel could not recover any fees);*  
9 *Conservatorship of Chilton, 8 Cal. App. 3d 34, 43, 86 Cal. Rptr. 860, 866 (1970) (in*  
10 *case of a clear conflict of interest, there was no error when the trial court found no*  
11 *value in the services rendered); see also Asbestos Claims Facility v. Berry & Berry,*  
12 *219 Cal. App. 3d 9, 26-27, 267 Cal. Rptr. 896, 906-07 (1990) (one of the methods by*  
13 *which the issue of attorney's conflict of interest may be raised is as a defense in the*  
14 *attorney's action to recover fees)." United States ex rel. Virani v. Jerry M. Lewis*  
15 *Truck Parts & Equip., Inc., 89 F.3d 574, 579 (9th Cir. 1996) (emphasis added).*

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19 In light of the conflict of interest between class counsel and the unnamed  
20 class members, and the inadequate record discussed above, the proper fee award in  
21 this instance should be zero.

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23 Respectfully submitted this 19<sup>th</sup> day of October, 2009

24 **LAW OFFICE OF JOHN W. DAVIS**

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26 \_\_\_\_\_  
27 /s/ John W. Davis

28 John W. Davis

Attorney for Objectors David Feldman, et al.