

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Consolidated Appeals

Nos. 07-56643; 07-56645; 07-56646; 07-56647;
07-56649; 07-56650; 07-56651; and 07-56833

RYAN RODRIGUEZ, et al.,
Class Plaintiffs/Appellees,

and

**WEST PUBLISHING CORPORATION, A MINNESOTA
CORPORATION d.b.a. BAR/BRI, et al.,**
Defendants/Appellees

vs.

GEORGE SCHNEIDER, et al.,
Objectors/Appellants

Appeal From Judgment Entered By
The United States District Court, Central District of California,
Manuel Real, District Court Judge
District Court Case No. CV-05-03222(R)

OPENING BRIEF OF APPELLANTS GEORGE SCHNEIDER *et al.*
(Appeal Nos. 07-56643 and 07-56833)

J. Garrett Kendrick (SBN 61698)
C. Benjamin Nutley (SBN 177431)
KENDRICK & NUTLEY
1055 E. Colorado Blvd., 5th Floor
Pasadena, CA 91106
Telephone: (626) 204-4060
Facsimile: (626) 204-4061

John Pentz
2 Clock Tower Place, Suite 260G
Maynard, MA 01754
Telephone: (978) 461-1548
Facsimile: (707) 276-2925

TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION AND APPEALABILITY 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 3

IV. STATEMENT OF FACTS 5

V. SUMMARY OF ARGUMENT 11

VI. STANDARD OF REVIEW 13

VII. ARGUMENT 14

 A. The Numerous Conflicts of Interest in this Case Amounted to
 Inadequate Representation, and Precluded Final Approval
 of the Proposed Class Settlement 14

 1. The District Court Was Required to Reject the Settlement
 After Finding that the Lead Plaintiffs Had Provided
 Inadequate Representation 15

 2. The Contingent “Amended Incentive Agreement”
 Presented a Prohibited Conflict and Failure of Adequacy
 Not Just for the Representative Plaintiffs, but for All
 Class Counsel 18

 3. There Was and Remains an Intra-Class Conflict on
 Clayton Act Claims 25

 B. The District Court Erred in Awarding and in Calculating Fees to
 Class Counsel 27

1.	Class Counsel’s Fees Should Have Been Vastly Reduced by the Acknowledged Conflict of Interest and Breach of Ethical Standards in this Case	27
2.	The District Court Erred in Awarding a 1.75 Multiplier on All of Class Counsel’s Time, Including Time not Yet Expended on Appeal and for Administration of the Settlement	29
C.	The District Court Erred in Denying the Head/Schneider Objectors’ Application for Attorneys’ Fees	31
VIII.	CONCLUSION	40

TABLE OF AUTHORITIES

Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997)	17, 26
<i>American Airlines v. Sheppard</i> , 96 Cal.App.4th 1017 (2002)	23-24
<i>Apple v. Superior Court</i> , 126 Cal.App.4th 1253 (2005)	21
<i>Barrios v. Calif. Interscholastic Federation</i> , 277 F.3d 1128 (9th Cir. 2002)	13, 14
<i>Bell Atlantic Corp. v. Bolger</i> , 2 F.3d 1304 (3d Cir. 1993)	32
<i>Bernardi v. Yeutter</i> , 951 F.2d 971 (9th Cir. 1991)	30
<i>Blecher & Collins v. Northwest Airlines, Inc.</i> , 858 F.Supp. 1442 (C.D. Cal. 1994)	28
<i>Bowling v. Pfizer, Inc.</i> , 132 F.3d 1147 (6th Cir. 1998)	30-31
<i>Cal Pak Delivery, Inc. v. United Parcel Service, Inc.</i> , 52 Cal.App.4th 1 (1997)	21, 22, 28
<i>Cal West Nurseries, Inc. v. Superior Court</i> , 129 Cal.App. 4th 1170 (2005)	20
<i>Clark v. City of Los Angeles</i> , 803 F.2d 987 (9th Cir. 1986)	30, 31

Class Plaintiffs v. Jaffe & Schlesinger P.A.,
19 F.3d 1306 (9th Cir. 1994) 39

Comden v. Superior Court,
20 Cal.3d 906 (1978) 22

Davis v. City and County of San Francisco,
890 F.2d 1438 (9th Cir. 1989) 13

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 17

Elliott v. Sperry Rand Corp.,
680 F.2d 1225 (8th Cir. 1982) 32

Flatt v. Superior Court,
9 Cal.4th 275 (1994) 20, 23

Frankenstein v. McCrory Corp.,
425 F.Supp 762 (S.D.N.Y 1977) 32

General Telephone Co. of Southwest v. Falcon,
457 U.S. 147 (1982) 17

Gilbert v. National Corp. For Housing Part.,
71 Cal.App.4th 1240 (1999) 19-20, 22

Green v. Transatron Electronics Corp.,
326 F.2d 492 (1st Cir. 1964) 37-38

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 16

Hansberry v. Lee,
311 U.S. 32 (1940) 16

<i>Hitachi, Ltd. v. Tatung Co.</i> , 419 F.Supp.2d 1158 (N.D.Cal. 2006)	23
<i>Hull v. Celanese Corporation</i> , 513 F.2d 568 (2d Cir. 1975)	22
<i>Huston v. Imperial Credit Commercial Mortg. Inv.</i> , 179 F.Supp.2d 1157 (C.D.Cal. 2001)	15, 21, 22
<i>Image Tech. Serv., Inc. v. Eastman Kodak Co.</i> , 136 F.3d 1354 (9th Cir. 1998)	28
<i>Jeffry v. Pounds</i> , 67 Cal.App.3d 6 (1977)	28
<i>Lerwill v. In-Flight Motion Pictures, Inc.</i> , 582 F.2d 507 (9th Cir. 1978)	16
<i>Matter of McLinn</i> , 739 F.2d 1395 (9th Cir. 1984)	13-14
<i>Ortiz v. Fibreboard</i> , 527 U.S. 815 (1999)	26
<i>Palumbo v. Tele-Communications, Inc.</i> , 157 F.R.D. 129 (D.D.C. 1994)	21-22
<i>Petrovic v. Amoco Oil Co.</i> , 200 F.3d 1140 (8th Cir. 1999)	32-33
<i>People ex Rel. Dept., Corps. v. Speedee O. Chg. Sys.</i> , 20 Cal.4th 1135 (1999)	23
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	16

Reynolds v. Beneficial National Bank,
288 F.3d 277 (7th Cir. 2002) 32, 38

San Gabriel Basin Water v. Aerojet-General Corp.,
105 F.Supp.2d 1095 (C.D.Cal. 2000) 15

Shaw v. Toshiba America Information Systems, Inc.
91 F.Supp.2d 942 (E.D. Texas 2000) 32

Sipper v. Capital One Bank,
2002 WL 398769 (C.D. Cal. 2002) 25

U.S. v. Jerry M. Lewis Truck Parts & Equipment,
89 F.3d 574 (9th Cir. 1996) 14

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002) 39

V.S. v. Los Gatos-Saratoga,
484 F.3d 1230, (9th Cir. 2007) 13, 14

Zucker v. Occidental Petroleum Corp.,
192 F.3d 1323 (9th Cir. 1999) 32

Statutes

15 U.S.C. §§ 1 and 2 3

15 U.S.C. §§ 15(a) 1

15 U.S.C. §18 3

15 U.S.C. § 26 1

28 U.S.C. § 1291 1

28 U.S.C. § 1337 1

I. STATEMENT OF JURISDICTION AND APPEALABILITY

The complaint in this action alleged violations of the Sherman and Clayton Acts. DR No. 1.¹ Jurisdiction in the trial court was based on Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26 and 28 U.S.C. § 1337.

The District court, the Honorable Manuel Real, entered a Final Order and Judgment Approving Settlement on September 10, 2007. ER No. 1. The appeal from that order was filed on September 25, 2007. ER No. 11. On November 8, 2007 the trial court entered an order denying Appellants' Motion for Attorneys' Fees. ER No. 7. Notice of Appeal from that Order was filed December 7, 2007. ER No. 4. These Appeals are from a final order and judgment approving the settlement of a class action and awarding plaintiffs' counsel attorneys' fees, as well as a collateral order denying appellants an award of attorneys' fees. Such orders are immediately appealable under 28 U.S.C. 1291.

II. ISSUES PRESENTED

1. Whether the district court abused its discretion in approving a class

¹ As used in this brief, the designation "DR No. ___" refers to the District Court's docket report entry number. The designation "ER No. ___" refers to the Excerpt of Record and the specific document no. in the Excerpt of Record.

action settlement while concurrently finding that the proceedings had been tainted by the appearance of impropriety, breaches of the Rules of Professional Conduct, breaches of fiduciary duty and candor to the court, and actual conflicts of interest between the representative plaintiffs and the class?

2. Whether the district court abused its discretion in failing to apply its findings of conflict, breaches of fiduciary duties and Rules of Professional Conduct, and failure of candor to the court to the class counsel in the case and in failing to find inadequate representation and disqualify class counsel as a consequence?

3. Whether there was an intra-class conflict that resulted in claims possessed by some, but not all, class members being ignored or traded for increased recovery by the other subclass, and whether the district court abused its discretion in failing to require separate representation and in approving the proposed settlement despite the existence of this conflict?

4. Whether the district court abused its discretion in awarding any amount of attorney's fees to class counsel after finding conflicts of interest, breaches of fiduciary duties and Rules of Professional Conduct, and failure of candor to the court arising from a contingent "incentive award" agreement (the "Amended Settlement Agreement") between named plaintiffs and their counsel.

5. Whether the district court abused its discretion in refusing to award any attorney's fees to counsel for the Head/Schneider Objectors when they were the objectors who pointed out the existence and effect of the Amended Incentive Agreement between certain named plaintiffs and their counsel and provided arguments later adopted by the district court in its order approving the settlement and denying the incentive awards to the Representative Plaintiffs?

III. STATEMENT OF THE CASE

Plaintiffs filed their complaint alleging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 7 of the Clayton Act (15 U.S.C. § 18) on April 29, 2005. DR No. 1. A nationwide litigation class was certified on May 15, 2006. DR No. 114. A settlement of the case was preliminarily approved by the district court, the Honorable Manuel Real, on March 26, 2007. DR No. 259. Pursuant to the notice sent to class members, Appellants timely filed Preliminary Objections to the settlement on May 21, 2007. DR Nos. 344 and 345.

The district court held a fairness hearing on June 18, 2007 to consider the final approval of the proposed settlement. At that hearing, the Head/Schneider Objectors, through their attorneys, alerted Judge Real to the existence of an "Amended Incentive Agreement" made between several of the

class representatives and their counsel, explaining that the agreements presented a prohibited conflict of interest for plaintiffs and their counsel. At the conclusion of the June 18, 2007 hearing, Judge Real continued the Final Approval hearing to July 9, 2007 and requested that the parties submit additional briefing on, among other things, the incentive awards and the possible conflict issues raised by the Amended Incentive Agreements. DR No. 350.

In response to the briefing on the matter by Plaintiffs, the Head/Schneider objectors submitted a Supplemental Objection and Response to Supplemental Filing by Plaintiffs re: Conflict of Interest on July 6, 2007. DR No. 409; ER No. 9. After argument presented at the July 9, 2007 hearing, the court issued an order approving the settlement, but denying incentive awards to the class representatives, on September 10, 2007, Opinion and Order ER No. 4 at 66-68. Final judgment approving the settlement was entered on September 10, 2007. ER No. 1. Appellants timely filed their Notice of Appeal on October 10, 2007. ER No. 11.

After reviewing the court's Opinion and Order (ER No. 4), Appellants filed a motion for attorneys' fees because they believed that they had provided the benefit of adversarial analysis to the district court and were a substantial

factor in the court's decision to deny \$325,000 in aggregate incentive awards to the named plaintiffs incentive awards to the named plaintiffs. The motion was opposed by plaintiffs and defendants. DR Nos. 442, 454, 459, 460, 464 and 469.

Judge Real denied attorneys' fees to the Head/Schneider Objectors by order dated November 8, 2007, holding that their counsel "did not add anything to the Court's order" on the incentive awards. ER No. 7. However, the existence and implications of the Incentive Agreements were unknown to Judge Real until counsel for the Head/Schneider objectors pointed it out at the final approval hearing. It is also apparent that several key sections of the Order are, in fact, nearly verbatim excerpts of original work found in the Head/Schneider Objectors' Supplemental Objection filed on July 6, 2007. ER No. 9; DR No. 409.

IV. STATEMENT OF FACTS

This is a class action case in which the district court ruled that plaintiffs appointed to represent the class had a longstanding conflict of interest with absent class members arising from a contingent agreement with class counsel. Opinion and Order ER No. 4 at 66-68. The written agreement was first disclosed to the district court by the Head/Schneider Objectors in the course of

final approval of a proposed settlement, leading Judge Real to find that the representative plaintiffs had a conflict of interest with the class. Consequently, he denied a total of \$325,000 in contingent incentive awards to the named plaintiffs. Order Denying Incentive Awards to Class Representatives ER No. 3.

The Incentive Agreements which are at the heart of this appeal were entered into in March 2005—a month before the complaint in this action was filed. Amended Incentive Agreements ER No. 8 at 142-169; Complaint DR No. 1. Pursuant to the Amended Incentive Agreements, plaintiffs' counsel was obligated to seek incentive awards for the named plaintiffs ranging from \$10,000 per plaintiff if the case settled for \$500,000 to \$75,000 if the case settled for \$10,000,000 or more. Kanazawa Declaration ER No. 8 at 140 ¶ 2. The Amended Incentive Agreements were provided to the Defendants in April of 2006, prior to class certification and before the negotiation of the proposed settlement. Opinion and Order ER No. 4 at 37: 14-15. However, the district court did not become aware of the Incentive Agreements until the first final approval hearing. Opinion and Order ER No. 4 at 67-68. The existence of the Incentive Agreements was not disclosed to the class in the notice sent to class members. Opinion and Order ER No. 4 at 67-68.

On the basis of the Incentive Agreements, Judge Real found that a conflict existed between the named plaintiffs and the class. Opinion and Order ER No. 4 at 66-68. This finding contrasts starkly with his prior May 15, 2006 order permitting the case to proceed as a class action and finding the plaintiffs and their counsel to be adequate representatives of the class. Order Granting Motion for Class Certification. DR No. 114.

In February 2007, McGuire Woods LLP, one of the firms appointed as class counsel, sought to withdraw as counsel of record for three of the named plaintiffs who opposed the settlement which had been negotiated in this matter. Motion to Withdraw DR 241 and 242. At the same time, plaintiffs' counsel sought preliminary approval of the settlement. Motion for Preliminary Approval of Settlement DR Nos. 243 and 244. The court denied the Motion to Withdraw as counsel and preliminarily approved the settlement in March 2007. DR No. 258.

In May, 2007, in connection with seeking final approval of the settlement agreement, plaintiffs' counsel filed a motion for an award of incentive fees to the named plaintiffs along with the Declaration of Sidney Kanazawa. DR Nos. 275 and 276. The Amended Incentive Agreements were not filed with the district court at that time, but were instead filed with a

supplemental declaration of Sidney Kanazawa on June 11, 2007, filed in support of responses to objections. ER No. 8.

In late May of 2007, Eliot Disner, one of the principal plaintiffs' attorneys in this case, was fired by McGuire Woods LLP and began representing the three plaintiffs who were opposed to the settlement (the "Objecting Plaintiffs"). DR No. 288. On May 31, 2007, Mr. Disner filed an *ex parte* application to speak freely for the Objecting Plaintiffs, to gain access to the McGuire Woods' files, and to be appointed co-lead counsel in the case. DR No. 304. The Head/Schneider Objectors submitted a responsive brief, warning the district court of a burgeoning conflict of interest problem in the case and proposing further briefing on the subject of appointing additional, unconflicted counsel. The district court denied Mr. Disner's motion on June 13, 2007. DR No. 346.

The final approval hearing on the settlement was held on June 18, 2007. At that hearing, the Head/Schneider Objectors strenuously opposed the requested incentive awards of \$75,000 for three of the named plaintiffs, and \$25,000 each for four additional named plaintiffs. At the Final Approval hearing, after the Head/Schneider objectors had raised the issue of the Amended Incentive Agreements, Judge Real requested them from plaintiffs'

counsel, indicating that he had not previously seen them.

At the conclusion of the June 18, 2007 hearing, Judge Real continued the Final Approval hearing to July 9, 2007 and requested that the parties submit additional briefing on the incentive awards and the possible conflict issues raised by the incentive agreements. DR No. 350.

In response to the subsequent briefing by Plaintiffs, the Head/Schneider objectors submitted a Supplemental Objection and Response to Supplemental Filing by Plaintiffs re: Conflict of Interest on July 6, 2007. DR No. 409; ER No. 9. After argument presented at the July 9, 2007 hearing, the court issued an order approving the settlement, but denying incentive awards to the class representatives on September 10, 2007, finding, among other things, that the incentive award agreement was “inappropriate and contrary to public policy,” and that it violated the California Rules of Professional Conduct “prohibiting fee-sharing with clients and fee-splitting among lawyers.” Opinion and Order ER No. 4 at 59-62.

Most importantly, the court found that the incentive agreement created a conflict of interest between the named plaintiffs and the rest of the class. Opinion and Order ER No. 4 at 66-68. Moreover, “the parties did not disclose their agreement to the Court from the outset and the agreement was never

disclosed to the class... no one informed the Court of the Incentive Agreement until well after the Preliminary Approval Hearing... The failure to disclose this agreement to the Court violates the class representatives' fiduciary duties to the class and duty of candor to the Court." Opinion and Order ER No. 4 at 67.

Judge Real concluded that "As evidenced by the oral arguments and briefing of some of the Objectors, the Incentive Agreement did in fact give the proceedings the appearance of impropriety." ER No. 4; p. 65: 3-5.

Nevertheless, rather than disqualifying some or all of the class representatives for their conflict of interest and failure of candor, Judge Real only denied the incentive awards they requested, ruling "Thus, the safeguards of notice and judicial approval could not operate to prevent the conflict of interests here. The Court must now act to remedy the conflict by declining to award incentive payments." ER No. 4 at pps. 67: 25-68:2.

Judge Real proceeded to approve the settlement, despite the facts he had found, stating that "the conflict of interest between the class Representatives and the class Members does not disturb the Court's finding that the Settlement is fair, adequate, and reasonable." ER No. 4 at 43.

Based upon the district court's denial of \$325,000 in aggregate incentive awards to the named plaintiffs, counsel for the Head/Schneider Objectors

petitioned the court for an award of attorneys' fees in the amount of one-third of the amount saved for the class, which was opposed by the Plaintiffs and Defendants. DR Nos. 442, 454, 459, 460, 464 and 469.

Judge Real denied attorneys' fees to the Head/Schneider Objectors by order dated November 8, 2007, holding that they "did not add anything to the Court's order denying the named plaintiffs' [incentive awards]." ER No. 7. On the record, however, there is little question that the existence and implications of the Incentive Agreements were unknown to Judge Real until counsel for the Head/Schneider objectors pointed it out at the first final approval hearing. It is also apparent that several key sections of the Order are, in fact, nearly verbatim excerpts of original work found in the Head/Schneider objectors' Supplemental Objection filed on July 6, 2007. ER No. 9; DR No. 409.

V. SUMMARY OF ARGUMENT

As a preliminary – and dispositive – matter, the district court's findings of conflict of interest, breaches of fiduciary duty, violations of the Rules of Professional Conduct and failure of candor on the part of the class representatives in this case precluded final approval of the settlement on due process grounds. These findings indicate inadequacy of representation by the representatives, which means that the district court has not successfully taken

jurisdiction over absent class members consistent with due process. That inadequacy of representation is not “remedied” merely by denying incentive awards to the representatives, as the district court did in a bid to salvage the settlement.

Moreover, although Judge Real did not expressly extend those rulings to class counsel, the nature of the violations and the facts of the case suggest that class counsel should have been faulted to an equal, if not greater, extent for the conflicts of interest, breaches of duty, and failure of candor identified by Judge Real. Again, the consequent failure of adequate representation should have precluded approval of the settlement.

The sudden issues of adequacy and conflict overshadowed an equally important issue of intra-class conflict, by which a subset of class members with additional claims will see those claims go entirely uncompensated under the settlement. This presented a class conflict of a different sort, but which also required unconflicted, adequate representation.

Even if the settlement were somehow approvable under the circumstances, notwithstanding the inadequacy of representation, the district court should have awarded much lower attorneys’ fees than were awarded here. The circumstances of apparent impropriety and actual conflict of interest set

forth in Judge Real's opinion cannot support the full fee award, much less a 1.75 multiplier on all attorney time spent, and to be spent, in the case.

Finally, the district court should not have denied the Head/Schneider Objectors' motion for attorneys' fees. Based upon the factual record and Judge Real's Order, their efforts were clearly of assistance to the court. They were the first to point out the existence and implications of the Amended Incentive Agreement that became the focus of the fairness hearings and the source of Judge Real's holdings on the conflicts of the class representatives. Indeed, Judge Real's Order adopts many of the arguments the Head/Schneider Objectors made in briefing the matter, some of them nearly verbatim.

VI. STANDARD OF REVIEW

District courts' approval of class action settlements are reviewed for abuse of discretion. *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989). District courts' decisions to grant or deny attorneys' fees are generally reviewed for abuse of discretion, and factual findings for clear error. *V.S. v. Los Gatos-Saratoga*, 484 F.3d 1230, 1232 (9th Cir. 2007). "A trial court abuses its discretion if its ruling on a fee motion is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Barrios v. Calif. Interscholastic Federation*, 277 F.3d 1128, 1133 (9th Cir.

2002).

However, any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed *de novo*. *Barrios*, 277 F.3d at 1133; *V.S. v. Los Gatos-Saratoga*, 484 F.3d at 1232. Therefore, in this case, the standard of review is *de novo* with respect to the district court's interpretation of California law (*Matter of McLinn*, 739 F. 2d 1395, 1397 (9th Cir. 1984) and with respect to whether the district court applied the correct legal standard regarding the award of attorneys' fees. *U.S. v. Jerry M. Lewis Truck Parts & equipment*, 89 F 3d 574, 576 (9th Cir. 1996). The amount of the attorneys' fee award is reviewed for an abuse of discretion. *Id.*

VII. ARGUMENT

A. The Numerous Conflicts of Interest in this Case Amounted to Inadequate Representation, and Precluded Final Approval of the Proposed Class Settlement

Although district court orders approving class action settlements are typically reviewed for a clear abuse of discretion, this case is unusual. Here, there were ethical issues – clearly recognized by the district court – that precluded a finding of adequacy of representation, an issue of basic compliance with constitutional due process. In addition, those ethical issues are the

product of California law, for which the district court's interpretation is reviewed *de novo*.² *Matter of McLinn*, 739 F.2d at 1397.

1. The District Court Was Required to Reject the Settlement After Finding that the Lead Plaintiffs Had Provided Inadequate Representation

Judge Real ruled that the Amended Incentive Agreement between the class representatives and their counsel presented a conflict of interest, and that there was a disconnect between the class representatives' interests and those of the class they had been appointed to represent. He further found that the proceedings had an "appearance of impropriety" and that there were breaches of the Code of Professional Responsibility, breaches of fiduciary duties, and a failure of candor to the court. ER No. 4 at pps. 61-68.

Nevertheless, Judge Real determined to "remedy the conflict" by eliminating the incentive awards and held that "the conflict of interest between

² Federal courts sitting in the Central District of California apply California law on conflicts of interest and attorney disqualification. See e.g., *Huston v. Imperial Credit Commercial Mortg. Inv.*, 179 F.Supp.2d 1157, 1166 (C.D.Cal. 2001) (class action); *San Gabriel Basin Water v. Aerojet-General Corp.*, 105 F. Supp.2d 1095 (C.D.Cal. 2000) ("the Central District of California has adopted the 'State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto' as the standard of professional conduct in the district. Local Rules, Ch. VI, R. 1.2.").

the Class Representatives and the Class Members does not disturb the Court's finding that the Settlement is fair, adequate, and reasonable." ER No. 4 at 43.

Those rulings cannot be reconciled under the law. Adequate representation is a necessary predicate to approval of a class settlement, regardless whether a district court independently believes the settlement to be fair, adequate and reasonable. "To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Adequacy of representation is absent when plaintiffs or their counsel have conflicts of interest with other class members. *Id.*, citing *Lerwill v. In-flight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Indeed, without due process afforded by adequate representation, class members cannot be bound to the settlement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985).

Because Judge Real found that the named plaintiffs here had conflicts of interest with unnamed class members, he was required to reject the settlement. He could not move on to find the settlement to be otherwise fair, reasonable, and adequate. "[T]he standards set for the protection of absent class members

serve to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem Products, Inc. v. Windsor*, 521 U.S. 59, 621(1997). The very point of the adequacy inquiry under Rule 23 is to "uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625. Once uncovered, and whenever in the progress of the case they are uncovered, such conflicts can hardly be ignored.

It is not sufficient to say that the adequacy of representation not afforded by the representatives was instead supplied by their counsel. Due process for absent class members requires more than mere adequacy of counsel. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-177 (1974). More importantly, "[t]he adequacy heading also factors in competency and conflicts of class counsel." *Amchem*, 521 U.S. at 626 n.20, citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982). As discussed below, counsel in this case also had conflicts of interest, implicit but unrecognized by the district court, which made them equally inadequate.

**2. The Contingent “Amended Incentive Agreement”
Presented a Prohibited Conflict and Failure of Adequacy
Not Just for the Representative Plaintiffs, but for All
Class Counsel**

Though Judge Real recognized and discussed at length the fact that the Amended Incentive Agreement presented a prohibited conflict of interest for the representative plaintiffs and a violation of the Rules of Professional Conduct, and the failure to disclose it a failure of candor, he failed to recognize a necessary and consequent effect – that these facts also presented a prohibited conflict for class counsel that eliminated adequacy of counsel and required their disqualification. For most of the misconduct identified by the district court, it took at least two to tango.

For example, the district court faulted the class representatives’ failure of candor in failing to disclose the Agreement to the court prior to final approval, but the responsibility to disclose such an agreement – and the conflict created by its existence and nondisclosure – surely falls even more upon the class counsel who negotiated it. The district court found the Incentive Agreement to be prohibited fee sharing, which required class counsel to agree to the arrangement. Further, as Judge Real acknowledged, class counsel disclosed the

agreement to the *defendants* (but not to the district court or the public) in April of 2006, which was prior to the negotiations of the settlement itself and prior to class certification. ER No. 4 at 37. This raises the specter of tacit collusion between plaintiffs and their counsel, on the one hand, and defendants on the other, who knew the contours of plaintiff's contingency-based agreement, including the minimum amount that would enable the plaintiffs to claim their incentive awards, at the time of negotiating the settlement. However, the district court did not apprehend the problem of collusion. Judge Real did, however, find that the conflict was not just apparent, but an "actual manifestation of conflicting interests." Order and Opinion ER No. 4 at 68 (noting that "The Objecting Plaintiffs claim that Class Counsel threatened to not request incentive payments on their behalf pursuant to the Incentive Agreement if they did not agree to the Settlement.")

Class counsel were, therefore, necessarily in the thick of the conflict. The conflicts and misconduct of the representative plaintiffs equally represented prohibited conflicts of interest for class counsel. "[A] conflict of interest exists whenever a lawyer's representation of one of two clients is rendered less effective because of his representation of the other" so that attorneys are prohibited from representing multiple clients with divergent interests. *Gilbert*

v. *National Corp. For Housing Part.*, 71 Cal.App.4th 1240, 1253 (1999). The rule reaches not just dishonest practitioners, but also prevents “the honest practitioner from putting himself in a position where he *may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.*” *Id.*, (emphasis added) quoting *Flatt v. Superior Court*, 9 Cal.4th 275, 289 (1994). When an attorney is in a position of having “to reconcile the divergent interests of his multiple clients” he necessarily violates his duty of loyalty. *Gilbert*, 71 Cal.App.4th at 1254.

When a lawyer is forced to negotiate among the competing interests of multiple clients, it is a case of a concurrent or simultaneous representation causing a conflict of interest which, in class actions, requires disqualification. A lawyer may not concurrently represent clients who have actual or potential conflicts, without informed written consent. *Cal West Nurseries, Inc. v. Superior Court*, 129 Cal. App. 4th 1170, 1175 (2005). With few exceptions, the rule of disqualification in simultaneous representation cases is a *per se* or automatic one even when the two matters have nothing in common and there is no risk of disclosure of confidential information. *Flatt v. Superior Court*, 9 Cal.4th 275, 284 (1994).

The rule is actually more stringent in class action cases. First, the major exception to the concurrent representation prohibition – waiver by the clients – is not available in class actions. *Apple Computer*, 126 Cal.App.4th at 1274, n.7 (“Unidentified class members cannot waive a potential conflict of interest.”) quoting *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* 52 Cal.App.4th 1, 12 (1997). Second, in a class action the disqualification rule is applied with more vigor because class counsel are held to a “heightened standard” of conflict avoidance. *Huston*, 179 F.Supp.2d at 1167:

“[I]n a class action context, disqualification is more likely because putative class counsel are subject to a ‘heightened standard’ which they must meet if they are to be allowed by the Court to represent absent class members.” As explained by one district court:

The fact that [counsel] seek to represent a national class of plaintiffs makes the decision to disqualify even more compelling . . . In the class action context, the Court has an obligation to closely scrutinize the qualifications of counsel to assure that all interests, including those of as yet unnamed plaintiffs are adequately represented. See Fed.R.Civ.P. 23(a)(4) (representative parties must “fairly and adequately represent the interests of the class”).

Huston, 179 F. Supp.2d at 1167, quoting *Palumbo v. Tele- Communications, Inc.*, 157 F.R.D. 129, 132-33 (D.D.C. 1994). Counsel are held to this heightened standard because, “in certifying a class action, the Court confers on

absent persons the status of litigants and ‘creates an attorney-client relationship between those persons and a lawyer or group of lawyers.’” *Palumbo*, 157 F.R.D. 129, 132-33 (citations omitted), quoted with approval in *Cal Pak Delivery*, 52 Cal.App.4th at 11-12 and followed in *Huston*, 179 F.Supp.2d at 1167.

Moreover, particularly in nationwide class cases receiving public attention and scrutiny, Courts are concerned with the public perception of the fair administration of justice:

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

Comden v. Superior Court, 20 Cal.3d 906, 915 (1978), quoting *Hull v. Celanese Corporation*, 513 F.2d 568, 572 (2d Cir. 1975); applied, *Cal Pak Delivery*, 52 Cal.App.4th at 13. See also *Gilbert v. National Corp. For Housing Part.*, 71 Cal.App.4th 1240, 1254-1256 (1999) (not error to disqualify attorney on the eve of trial for conflict of interest in light of need to “preserve public trust in the administration of justice and the integrity of the bar”; clients’ right to retain counsel of their choice “must yield to the court’s obligation to protect ‘the very integrity of the judicial process’ from a violation of the ethical

standards of professional responsibility.”)

Two corollaries to the disqualification rule are worth noting in this case. First, when a lawyer is disqualified for a conflict of interest, the disqualification extends to the lawyer’s entire firm. *Flatt v. Superior Court*, 9 Cal.4th 275, 283 (1994). That is true even if the attorney is only “of counsel” to the firm, and whether or not confidential information was actually shared between the lawyer and other members of the firm.³

Second, an attorney or law firm cannot avoid disqualification by withdrawing from the relationship by, for example, attempting to withdraw from representation of one of the clients. *Flatt*, 9 Cal.4th at 288 (“So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it.”). See also *American Airlines v. Sheppard*, 96 Cal.App.4th 1017, 1037 (2002):

³ *People ex Rel. Dept., Corps. v. Speedee O. Chg. Sys.*, 20 Cal.4th 1135 (1999). The *Speedee* case, coincidentally, considered whether Eliot Disner’s “of counsel” relationship to the firm of Shapiro, Rosenfeld & Close necessitated the disqualification of the firm in a matter in which Mr. Disner had been disqualified. The California Supreme Court concluded that his conflict of interest must be imputed to the Shapiro firm, leading to its vicarious disqualification “to assure the preservation of [the client’s] confidences and the integrity of the judicial process.” *Id.* at 1139; see also *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp.2d 1158, 1164 (N.D.Cal. 2006) (affirming and applying California’s strict application of vicarious disqualification).

A lawyer may not avoid the automatic disqualification rule applicable to concurrent representation of conflicting interests by unilaterally converting a present client into a former client. . . .It therefore follows, a lawyer may not avoid breaching the duty of loyalty which the concurrent representation rule is designed to avoid by unilaterally converting a present client into a former client. In fact, such conversion may itself be a breach of loyalty.

In this case, class counsel sought to do just that – to withdraw from representing the Objecting Plaintiffs. DR Nos. 241, 242 and 252. The district court denied the motion to withdraw as counsel on March 19, 2007. DR No. 258. Class counsel also dismissed an assertedly conflicted attorney – Mr. Disner – but long after the conflict had existed and ripened. These actions were essentially in aggravation of, and not a cure for, the conflicts in this case.

Under these authorities, the district court’s findings should have led it to enquire further about whether plaintiffs and their counsel should have been disqualified for inadequate representation. It may be observed that not all of the plaintiffs or class counsel firms participated in the Amended Incentive Agreements. See Order and Opinion ER No. 4 at 38. However, their adequacy is also at issue under the circumstances, and was not adequately explored by the district court. For the two plaintiffs and their counsel who did not execute the Amended Incentive Agreements also did not disclose it, though they should have been aware of it and its deleterious implications. As another

district court held in *Sipper v. Capital One Bank*, 2002 WL 398769 (C.D. Cal. 2002), a case relied upon by the district court below, the failure to discover and disclose conflicts of interest in a class action case is enough reason to disqualify associate counsel, even though they are not directly involved in the misconduct. *Id.* at *4.

Further, as discussed next, all named plaintiffs and class counsel face an additional, intra-class conflict, quite apart from the Amended Incentive Agreement, that they permitted and which also calls their representation into question.

3. There Was and Remains an Intra-Class Conflict on Clayton Act Claims

Although the conflict of interest created by the Amended Incentive Agreement drew more attention in this case before the district court, a less dramatic but no less material conflict also exists: the intra-class conflict caused by the presence of Clayton Act claims for some, but not all, class members.

Judge Real declined to take cognizance of the intra-class conflict created by the existence of the Clayton Act claims, observing that “The only difference between the Section 7 [Clayton Act] and Sherman Act claims is the damages.” Opinion and Order ER No. 4 at 47: 26-27.

But “the only difference” makes all the difference. As Judge Real implicitly acknowledged, there is a division between class members who have additional Clayton Act damages claims and those who do not. That difference is not reflected in the Settlement’s damages allocation and is a prima facie indication of a conflict among class members. *Ortiz v. Fibreboard*, 527 U.S. 815 (1999) (class not adequately represented where a change in insurance coverage created disparity in the value of claims between class members, thus requiring the division of the class into sub-classes with separate counsel to eliminate conflicting interests); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (neither predominance nor adequacy requirements under Rule 23 satisfied where subclasses were not created between injured and “exposure-only” class members in asbestos litigation). This issue is all the more acute when it appears that a high percentage of potential damages in the case are allocable to the Clayton Act claims.⁴ This is a classic conflict of interest that precludes a finding of adequate representation for class members who have Clayton Act claims. As with the other conflicts, its existence should

⁴ See Plaintiffs Ryan Rodriguez [et al.] Objection to Preliminarily Approved Settlement [etc.] DR 328 at 2, n.2 (pointing out that, while total damages for the entire class period were \$170 million, Plaintiffs’ expert estimated damages for the four-year claim under Section 7 as over \$146 million, which amounts to over 84% of the damages in the case).

have precluded approval of the settlement for lack of adequate representation. Given the extent of the conflicts in this case identified by the district court, it was a clear abuse of discretion for the district court to have approved the settlement, and the proper remedy in this Court is a reversal of the approval order and remand so that adequate representation for the class can be provided.

B. The District Court Erred in Awarding and in Calculating Fees to Class Counsel

If this Court holds that the district court erred in approving the settlement, it will be unnecessary to proceed to the propriety of the award of fees to class counsel because the award of those fees is predicated upon a settlement. Nevertheless, should the issue remain or arise again, Appellants proceed to discuss the following problems with the award of attorneys' fees here.

1. Class Counsel's Fees Should Have Been Vastly Reduced by the Acknowledged Conflict of Interest and Breach of Ethical Standards in this Case

Even assuming that the district court could approve a settlement proffered by inadequate representatives and their counsel, the fee awarded to the lawyers in this case far exceeds what could legally be awarded from the

class fund under the circumstances.

A conflict of interest that requires disqualification of the Plaintiffs and their attorneys puts the attorneys' entitlement to fees to be paid from any class fund deeply in jeopardy. *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998) "Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification. . . .An attorney cannot recover fees for such conflicting representation. . . . because 'payment is not due for services not properly performed.' citing *Blecher & Collins v. Northwest Airlines, Inc.*, 858 F. Supp. 1442, 1457 (C.D. Cal. 1994), quoting *Cal Pak Delivery*, 52 Cal.App.4th at 14, n.2.

The exception to the rule is that an attorney may claim fees in *quantum meruit* only for services provided before the conflict arose and the ethical breach occurred. *Image Tech*, 136 F.3d at 1358, citing *Jeffry v. Pounds*, 67 Cal.App.3d 6 (1977).

The observance of this body of law would have constrained the district court to award much less than it awarded in this case – and possibly nothing at all – because the conflict of interest began before the filing of the case, involved conflicting representation and the breach of Rules of Professional

Conduct, and resulted in both a potential and actual conflict of interest.

Instead, the district court awarded time-and-three-quarters to every hour billed by class counsel, up to 25% of the class fund. As explained below, this was inappropriate even without reference to issues of adequacy of representation.

The approval of the fee in this case without any reference to the conflicts was a clear abuse of discretion requiring remand of this action so that the fee can be reduced to reflect the serious ethical breaches recognized but not accounted for by the district court's fee order.

2. The District Court Erred in Awarding a 1.75 Multiplier on All of Class Counsel's Time, Including Time not Yet Expended on Appeal and for Administration of the Settlement

Putting aside the issue of whether class counsel can obtain a fee despite conflicts of interest and dual representation, the district court's ruling on the fees cannot be upheld for independent reasons. Judge Real did not award a fee certain, but rather granted class counsel a 1.75 multiplier on their time, up to 25% of the settlement fund, which grant appears to apply prospectively to time spent defending the settlement and fee award on appeal, and on the later administration of the settlement. ER No. 2 at 29: 8-25.

In cases in which class counsel have obtained orders permitting future fee requests based upon anticipated additional time administering a complex settlement or monitoring compliance with a consent decree, courts require judicial oversight to ensure that the reported lodestar and expenses are accurate, and that counsel are paid only for work that benefits the class. *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1152 (6th Cir. 1998) (“*Bowling II*”). Plaintiffs had the burden of establishing that a “future fee” schedule is appropriate, something they never attempted in this case. See *Bernardi v. Yeutter*, 951 F.2d 971, 976 (9th Cir. 1991).

Even assuming class counsel were reasonably entitled to some additional fees for future work, prospectively awarding a multiplier for tasks not yet accomplished is incorrect and, in any case, post-settlement work is typically not accorded *any* multiplier. E.g., *Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986) (42 U.S.C. §1988 case). See also *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1151 (6th Cir. 1998) (“*Bowling I*”):

On remand, the court should not use a multiplier in its lodestar calculations. A multiplier “account[s] for additional factors such as the contingent nature of the case and the quality of an attorney’s work.” *Bowling*, 922 F. Supp. at 1278 [*Bowling I*]. Class and special counsel are adequately compensated for the quality of their work in this case by their billing rates, which range as high as \$325 per hour. Regarding contingency, this case has settled so

there is no risk. See *Bowling*, 922 F. Supp. at 1282. Class and special counsel do not merit the benefit of a multiplier.

Even in statutory fee-shifting cases, in which time spent on fee issues may be compensable, that time is typically not afforded a multiplier. *Clark*, 803 F.2d at 992 (risk and delay are greatly diminished at fee-petition stage, and where no other factor exists for awarding multiplier on fee petition work, it is an abuse of discretion to award a multiplier on that time). For these additional reasons, the fee award to class counsel is insufficiently supported by the existing record or by the law. At a minimum, the fee award should be reversed, and the district court instructed to arrive at a fee amount that gives due consideration to the applicable standards and the conflicts of interest recognized by the district court.

C. The District Court Erred in Denying the Head/Schneider Objectors' Application for Attorneys' Fees

Judge Real denied fees to the Head/Schneider Objectors, tersely reciting that their counsel “did not add anything to the Court’s order” denying the named Plaintiffs’ incentive awards. That ruling is demonstrably incorrect factually and, more importantly, misconstrues the legal standards applicable to fee awards to objectors in class actions.

Federal courts have long recognized that the appearance of competent objectors in class actions is critical to their understanding of the settlements brought to them. *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999) (objector’s attorney made “substantial” contribution “by providing an adversarial context in which the district court could evaluate the fairness of attorneys’ fees.”).⁵ Objectors whose counsel bring these “adversarial benefits” to a proposed settlement are entitled to recover attorneys’ fees. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (desirable participation of objectors in fairness hearings “is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee.”);⁶ *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999)

⁵ See also *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304,1310 (3d Cir. 1993) (in settlement, courts lose benefits of adversarial process so that “objectors play an important role by giving courts access to information on the settlement’s merits.”).

⁶ *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (fee awarded from attorneys’ fees fund to named plaintiffs who, representing group of objectors, “contributed to the adversarial nature of the proceedings” by their participation in the settlement hearing); *Frankenstein v. McCrory Corp.*, 425 F.Supp 762, 767 (S.D.N.Y 1977) (“The presence of an objector represented by competent counsel transformed the settlement hearing into a truly adversarial proceeding entitling objector to an award of attorneys’ fees.”); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 973-74 (E.D. Texas 2000) (awarding counsel for objectors a \$6 million fee for securing settling parties’ agreement to 180 day extension in settlement coupon

(objectors' lawyers are entitled to fees when they "demonstrate that their services were of some benefit to the fund or enhanced the adversarial process.").

The Head/Schneider Objectors surely provided the benefit of adversarial analysis in the case. Judge Real's decision to deny the requested incentive awards in their entirety was primarily based upon the facts and arguments raised by the Head/Schneider Objectors at the final approval hearing and in their Supplemental Objection. As Judge Real himself observed in the course of denying the incentive awards:

Also in this case, there are a number of outspoken Objectors who make valid and well-reasoned arguments regarding the value of the work done by the Class Representatives and the impropriety of the Incentive Agreement which five of them signed.

ER No. 4; p. 57: 10-14.

As evidenced by the oral arguments and briefing of some of the Objectors, the Incentive Agreement did in fact give the proceedings the appearance of impropriety.

ER No. 4 at p. 65.

Indeed, a side-by-side comparison of the Head/Schneider Objectors' Supplemental Objection with Judge Real's eventual Opinion and Order makes

redemption period).

it clear that it was the Head/Schneider Objectors’ “valid and well-reasoned arguments” that Judge Real adopted in his Order:

<p>July 6, 2007 Head/Schneider Supplemental Objection, ER No. 9</p>	<p>September 10, 2007 Opinion and Order, ER No. 4</p>
<p>“A trial might return a much larger aggregate sum to the class, but would increase individual returns, including those of the named representatives, only marginally. A loss at trial would see the incentive awards evaporate, whereas a win would not increase them. Thus there was a disconnect between the interests of the named representatives and the interests of the absent class members, and a consequent conflict of interest.”</p> <p>ER No. 9; p. 176: 3-8.</p>	<p>“A trial might return a much larger aggregate sum to the class, but would increase individual returns, including those of the Class Representatives, only marginally, if at all. A loss at trial would eliminate the incentive award, but a win would not increase it. Thus, there was a disconnect between the interest of the Class Representatives and the unnamed Class Members, and a consequent conflict of interests.”</p> <p>ER No. 4; p. 67: 6-10.</p>
<p>“[T]he Incentive Agreement has, in fact, resulted in actual manifestations of divided loyalties...Class Counsel’s threat to withdraw from representation if the Objecting Plaintiffs did not support the settlement apparently included a threat that they would not be awarded their incentive payments if they did not agree to the Settlement.”</p> <p>ER No. 9 at p. 177: 4-5 and 20-22</p>	<p>“The conflict of interests here was not simply potential. Indeed, in this case there was an actual manifestation of conflicting interest. The Objecting Plaintiffs claim that Class Counsel threatened to not request incentive payments on their behalf pursuant to the Incentive Agreement if they did not agree to the Settlement.”</p> <p>ER No. 4 at 68: 3-6.</p>

July 6, 2007 Head/Schneider Supplemental Objection, ER No. 9	September 10, 2007 Opinion and Order, ER No. 4
<p>“Plaintiffs’ argument that the Objecting Plaintiffs’ challenge to the settlement shows that they were not influenced by the incentive awards is surprisingly naive, and demonstrates a misunderstanding of those Plaintiffs’ tactical position. The Objecting Plaintiffs in fact argued that they “fully support” the \$13 million settlement with Defendant Kaplan, that it <i>should be approved</i> and interim attorneys’ fees awarded, and that the remainder of the case be bifurcated. . . In other words, under the Incentive Agreements, the <i>Kaplan settlement alone</i> would support the \$75,000 incentive awards requested by the Objecting Plaintiffs because it <i>exceeds \$10 million.</i>”</p> <p>ER No. 9; p. 176: 9-20. (Emphasis in original)</p>	<p>“Although the Objecting Plaintiffs argue that there is no actual conflict of interests because they continue to object to the Settlement, the Objecting Plaintiffs have never taken a position that jeopardizes their \$75,000 incentive award request because they do not object to the settlement with Kaplan. The \$13 million settlement with Kaplan alone exceeds the \$10 million provision in the Incentive Agreement which contractually requires Class Counsel to request a \$75,000 incentive payment on their behalf.”</p> <p>ER No. 4; p. 68: 7-12</p>

<p>July 6, 2007 Head/Schneider Supplemental Objection, ER No. 9</p>	<p>September 10, 2007 Opinion and Order, ER No. 4</p>
<p>“Objectors note that the Incentive Agreement was provided to the defendants in the case in April of 2006.”</p> <p>ER No. 9 at 176 n. 3</p> <p>“The failure to disclose the Incentive Agreement to the Court until the middle of the final approval process is itself a failure of candor bearing on the adequacy of Plaintiffs and their counsel. See <i>Sipper v. Capital One Bank</i>, (2002 WL 398769 (C.D. Cal. 2002)). Footnote 4: A true and correct copy of the [<i>Sipper</i>] opinion is attached hereto as Exhibit A.</p> <p>ER No. 9 p. 178: 11-14</p>	<p>“In fact, although apparently the Incentive Agreement was provided to Defendants in April of 2006, no one informed the Court of the Incentive Agreement until well after the Preliminary Approval Hearing, when the incentive award requests were made. The failure to disclose this agreement to the Court violates the class representatives’ fiduciary duties to the class and duty of candor to the Court. See <i>Sipper v. Capital One Bank</i> [citation omitted]”</p> <p>ER No. 4 p. 67: 14-19</p>

The Head/Schneider Objectors made the conflict of interest arguments ultimately adopted – in some cases verbatim – by the district court. It cannot reasonably be said of these Objectors that their arguments “did not add anything” to the district court’s denial of the incentive awards.

There are no facts in the record to support a contrary conclusion. Neither the record nor logic supports the conclusion that Judge Real intended all along

to deny the incentive awards because of a conflict of interest arising from the existence of a contingent agreement that he had not seen or considered until the Head/Schneider Objectors brought it to his attention at the final approval hearing.

On the contrary, even if Judge Real had intended to deny the incentive awards altogether for some other reason not made apparent at the time objections to the settlement were due, that would be an insufficient justification for denying the Head/Schneider Objectors' fee request. In *Green v. Transitron Electronics Corp.*, 326 F.2d 492 (1st Cir. 1964), the First Circuit held that it is an abuse of discretion for a district court to deny an award of attorney's fees to counsel for an objector who raises arguments ultimately adopted by the court, even if the court's decision was assertedly driven by the court's pre-existing misgivings:

Pursuant to the lower court's show cause order directed to the class and inviting objections to the proposed settlements, Kasoff filed an affidavit and his two attorneys filed a memorandum and orally argued against giving the extra payment to the mutual funds... This view was ultimately adopted by the court but counsel were refused compensation for their efforts because, in the words of the court, 'Before this Court knew of the objections of Messrs. Milberg and Berger it had determined not to approve the settlement unless the \$300,000 were added to the \$5,000,000 instead of being paid to the mutual funds.' However, at the time the objections were raised ... none of the court's misgivings were

a matter of record and all other counsel for plaintiffs and defendants were on record as approving of the proposed settlement...

We think it unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is ultimately adopted by the court, but then receives no credit therefore because the court was thinking along that line all the while. Appellant Kasoff was not a volunteer but came in at the invitation of the court. His attorneys should not be denied compensation for reasons not apparent on the record, especially when the objection advanced resulted in a benefit to the class ... *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939).

Id., 326 F.2d at 498-99.

The Seventh Circuit confirmed the continuing viability of the *Transitron* holding in the more recent case *Reynolds v. Beneficial Natl. Bk.*, 288 F.3d 277 (7th Cir. 2002) (Posner, J.):

It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally. This participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee...

The judge denied a fee to the objectors in part on the ground that he had already decided, without telling anybody, not to accept the reversion. But objectors must decide whether to object without knowing what objection may be moot because they have already occurred to the judge.

Id. at 288. These authorities make it clear that denying a fee to an objector who has informed or influenced the proceedings in a way that is beneficial to the

court and class is an abuse of discretion.

Further, the Head/Schneider Objectors' bid for attorneys' fees was not based solely upon providing adversarial benefits to the class action process. It is well-established in this Circuit that an attorney whose services tend to "create, increase, protect or preserve" a settlement fund is entitled to an award of attorney's fees. *Class Plaintiffs v. Jaffe & Schlesinger P.A.*, 19 F.3d 1306, 1308 (9th Cir. 1994). Objectors are entitled to fees when they "substantially enhance[] the benefits to the class under [a] settlement..." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). In this case, the Head/Schneider Objectors did just that. If the settlement stands, their objections will have contributed to the preservation of the class fund from the incentive awards sought in the case by the Representative Plaintiffs, with the result that at least \$325,000 of additional funds would remain in the Net Settlement Fund for distribution to the class after payment of attorney's fees. The Head/Schneider Objectors were entitled to an award of attorney's fees for their efforts, which went beyond mere adversarial context and actually conferred a quantifiable benefit upon the class by preserving the class fund.

VIII. CONCLUSION

As is amply indicated by the district court's own opinion in this matter, the conduct of this case has been tainted by the appearance of impropriety, actual conflict of interest, and inadequate representation. Appellants respectfully request that this Court REVERSE the Orders of the district court approving the settlement in this case, awarding fees to class counsel, and denying fees to the Head/Schneider Objectors, and that this Court remand the matter to the district court for further proceedings concerning:

1. The disqualification of some or all of the Representative Plaintiffs and the appointment of additional Representatives; including a determination of whether some or all of the class counsel previously appointed should be disqualified and different class counsel appointed to represent the class;
2. Whether it is appropriate to create a subclass of Clayton Act claimants, with separate representation, and
3. In the event a settlement is correctly approved, a redetermination of the appropriate fees under applicable law, if any, to be awarded to class counsel previously appointed; and

4. A redetermination of the Head/Schneider Objectors' fee request under applicable law.

Dated: March 31, 2008

Respectfully Submitted



J. Garrett Kendrick

C. Benjamin Nutley

KENDRICK & NUTLEY

1055 E. Colorado Blvd., 5th Floor

Pasadena, CA 91106

John Pentz

2ClockTower Place, Suite 260G

Maynard, MA 01754

Attorneys for Appellants

George Schneider, *et al.*

CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NO. 07-56643 and 07-56833

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I
certify that the attached brief is proportionately spaced, has a typeface of 14
points and contains 9,007 words.

Dated: March 31, 2008

KENDRICK & NUTLEY

By:


J. Garrett Kendrick

Attorneys for Appellants
George Schneider, *et al.*

STATEMENT OF RELATED CASES

Appellants George Schneider *et al.*, are aware of no related cases pending in this Court other than those that have already been consolidated with their appeals. Those Appeals are Nos. 07-56645, 07-56646, 07-56647, 07-56649, 07-56650 and 07-56651.

CERTIFICATE OF SERVICE

I, J. Garrett Kendrick, an attorney licensed to practice in the State of California and a member of the Bar of this Court, hereby certify as follows:

I served the following document(s):

OPENING BRIEF OF APPELLANTS GEORGE SCHNEIDER, *et al.*

by making true and correct copies and depositing them with the U.S. Postal Service, postage prepaid on April 1, 2008 and addressed to the following:

SEE ATTACHED LIST

BY EMAIL: By transmitting them by email to the addresses on the attached Service List on March 31, 2008. The email address of the sender was jgk@private-ag.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 31, 2008 at Long Beach, California.

J. Garrett Kendrick

SERVICE LIST

Sidney K. Kanazawa
McGUIRE WOODS LLP
1800 Century Park East, 8th Floor
Los Angeles, CA 90067
skanazawa@mcguirewoods.com
Class Counsel/Appellee

L. Kendall Satterfield
FINKELSTEIN THOMPSON LLP
1050 30th Street, N.W.
Washington, D.C. 20007
ksatterfield@finkelsteinthompson.com
Class Counsel/Appellee

Robert Schachter
ZWERLING SCHACHTER &
ZWERLING LLP
1904 Third Avenue, Suite 1030
Seattle, WA 98101
rschachter@zsz.com
Counsel for Defendant/Appellee

Bradley S. Phillips
MUNGER, TOLLES & OLSON
LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
brad.phillips@mto.com
Counsel for Defendant/Appellee

James P. Tallon
SHEARMAN & STERLING, LLP
599 Lexington Avenue
New York, NY 10022-6069
jtallon@shearman.com
Counsel for Defendant/Appellee

Edward A. Klein
LINER YANKELEVITZ
SUNSHINE & REGENSTRIEF
LLP
1100 Glendon Avenue, 14th Floor
Los Angeles, CA 90024-3503
eklein@linerlaw.com
Counsel for Defendant/Appellee

Darrell Palmer
LAW OFFICES OF DARRELL
PALMER
603 North Highway 101, Suite A
Solano Beach, CA 92075
darrell.palmer@cox.net
Counsel for Objector/Appellant

Daniel S. Brown
131 Lawnview Circle
Danville, CA 94526-5107
absentprof@yahoo.com
Counsel for Objector/Appellant

Steven Helfand
HELFAND LAW OFFICES
582 Market Street, Suite 1400
San Francisco, CA 94101
steven@stevenhelfand.com
Counsel for Objector/Appellant

John W. Davis
LAW OFFICE OF JOHN W.
DAVIS
4445 Eastgate Mall, 2nd Floor
San Diego, CA 92121
john@johnwdavis.com
Counsel for Objector/Appellant

Robert C. Chojnacki
Law Offices of Robert C. Chojnacki
525 Laurel Avenue
Menlo Park, CA 94025
chojnackilaw@yahoo.com
Counsel for Objector/Appellant

Charles A. Sturm
STEELE STURM, PLLC
1000 Louisiana, Suite 3780
Houston, TX 77002
csturm@steelesturm.com
Counsel for Objector/Appellant

Ronald D. Rosengarten
ROSENGARTEN & LEVEN, LLP
23801 Calabasas Road, Suite 1015
Calabasas, CA 91302
rdresq@sbcglobal.net
Counsel for Objector/Appellant

Scott L. Nelson
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009-1001
snelson@citizen.org
Counsel for Objector/Appellant