Appeal No. 16-56313

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN STETSON, SHANE LAVIGNE, CHRISTINE LEIGH BROWN-ROBERTS, VALENTIN YURI KARPENKO, and JAKE JEREMIAH FATHY,
Plaintiff Class Representatives/Appellants,
vs.
SETH BRYANT GRISSOM, et al.,
Objector Class Members-Appellees

Appeal from the United States District Court
for the Central District of California
Civil Action No. CV-08-00810 RGK-E
Honorable R. Gary Klausner, United States District Judge

PLAINTIFF- APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

Appellants are not corporations and therefore a corporate disclosure statement is not included.

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JURISDICTIONAL STATEMENT

Appellants submit the following jurisdictional information:

1. The complaint in this action alleged violations of the Sherman and Clayton Acts. [ER 15]. 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. [ER Vol. 4 at -659, Class Action Complaint for Violations of the U.S. Antitrust Laws, Page 7 of 58].

2. This appeal arises from the district court's August 11, 2016 partial award of attorneys' fees and reimbursement of expenses. [ER Vol 1 at 0001] An order on attorney fees is appealable as a collateral order. Leslie v. Grupo ICA, 198 F.3d 1152, 1160 (9th Cir. 1999); see also Culinary & Service Emp. Union v. Hawaii Emp. Ben. Admin., 688 F.2d 1288, 1232 (9th Cir. 1982).

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court failed to follow the law of this Circuit, and thus erred to reversal, in denying Appellants' petition for attorney fees. (Appellants petitioned for $1,945,934.89 but were only awarded $918,898.)

STANDARD OF REVIEW: *de novo* as to application of and compliance with Ninth Circuit law. Abuse of discretion for clear error in the district court's underlying factual determinations and/or absence thereof.

2. Whether the district court failed to follow the law of this Circuit, and thus erred to reversal, in denying Appellant's petition for reimbursement of costs. (Appellants petitioned for $49,934.89 but were only awarded $20,734.90.)

STANDARD OF REVIEW: *de novo* as to application of and compliance with Ninth Circuit law. Abuse of discretion for clear error in the district court's underlying factual determinations and/or absence thereof.

STATEMENT OF THE CASE

Appellants respectfully appeal from the August 11, 2016, district court Order rejecting their request for $1.9 million in attorney's fees and $49,934.89 in incurred litigation costs from the $9,500,000 common-fund settlement reached in this case (the "Second Fee Award"), as well as the district court's grant of incentive awards and attorneys' fees to the individual objectors.[1] In the Second

[1] In this brief, the designation "DE" refers to the district court's docket entry number, and the designation "ER" refers to the Excerpts of Record filed in support of this appeal. References to specific page numbers in the Excerpts of Records will appear after "ER" ant the specific Volume number and indicate the ER Bates Number(s) of the document(s) referenced.

Fee Award, the district court awarded only 46.5% of Class Counsels' requested fee and but 41.5% of the requested costs. The Motion for fees was based in part on a combined lodestar of $918,898 for 1,541.2 hours of work, a mixed hourly rate of $596.22. [DE 146, Motion for Award of Attorney's Fees and Reimbursement of Costs, ER Vol. 4 at 0621].

A. Summary of Plaintiffs' Claims.

Plaintiffs commenced this action over nine years ago, in February 2008. [ER Vol. 4 at 0657, Class Action Compl. for Violations of the U.S. Antitrust Laws]. Plaintiffs' Complaint alleged that West and Kaplan had violated section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to restrain trade in the full-service bar-review-course market. [ER Vol. 4 at 0685, ¶¶ 92–98]. Plaintiffs' Complaint also alleged that West had violated section 2 of the Sherman Act, 15 U.S.C. § 2, by unlawfully acquiring and/or maintaining a monopoly of the bar-review market. [ER Vol. 4 at 0686-88, ¶¶ 99–111]. The centerpiece allegation against West and Kaplan was that they had entered into an illegal "co-marketing" agreement in 1997 under which Kaplan agreed to withdraw its bid to purchase West and stay out of the full-service bar-review market in exchange for an annual payment from West. [ER Vol. 4 at 0672, ¶48].

B. The Court's Initial Dismissal on Account of the Rodriguez Settlement.

One month after Plaintiffs' filed their Complaint, West moved to dismiss. [DE 28] Kaplan submitted papers joining in the Motion. [DE 32] Principally, West argued that Plaintiffs' claims were preempted under a settlement reached in 2007 in the related Rodriguez action. [DE 28] Rodriguez was an antitrust class action brought against West and Kaplan for an alleged conspiracy to restrain trade in the bar-review-course market. [DE 147-1] As alleged by the Rodriguez plaintiffs, West and Kaplan had entered the illegal co-marketing agreement identified above. [Id.] Rodriguez was settled by the parties thereto, with the Court granting final settlement approval in 2007. As part of the Rodriguez settlement, West and Kaplan agreed to certain non-monetary relief, including the termination of their co-marketing agreement. Rodriguez v. West Publ'g Corp., 2007 WL 2827379 at *10-12 (C.D. Cal. Sept. 10, 2007), aff'd in relevant part and rev'd in part on other grounds, 563 F.3d 948 (9th Cir. 2009). Such non-monetary relief was designed to foster competition in, and eliminate alleged barriers to entry into, the bar-review-course market. See Rodriguez, 2007 U.S. WL 2827379 at *12.

In deference to the Rodriguez settlement, the district court dismissed Plaintiffs-Appellants' Complaint with prejudice on April 10, 2008. [DE 49, Apr. 10, 2008, Order Granting Def. West's Mot. to Dismiss, ER Vol. 4 at 0650]. According to the Court:

> Defendant's motion to dismiss pursuant to 12(b)(6), the motion is granted. Procedurally, plaintiffs are estopped from making an end run around this court's December 17th, 2007, order which granted defendants' motion to dismiss without leave to amend. . .
>
> [S]ubstantively, [P]laintiffs' allegations regarding the current state of the market and its effects on individual [P]laintiffs cannot be squared with the provisions of the Rodriguez settlement. In [ap]proving the Rodriguez settlement, this [C]ourt noted that the non-monetary relief provisions of the Rodriguez settlement removed allegedly significant barriers to entry [in the bar-review-course market]. . . .
>
> Thus, the allegations that contradict these findings fail . . . .

[ER Vol. 4 at 0655-56 (Apr. 7, 2008, Tr. of Proceedings at 4:17–5:2)].

C. Plaintiffs' Appeal of the Dismissal.

Following the district court's ruling on West's Motion, Plaintiffs appealed. [DE 51, May 7, 2008, Notice of Appeal]

Oral argument for the appeal was heard by the Ninth Circuit on September 30, 2009. In October 2009, in lieu of ruling on the appeal, the Ninth Circuit issued an Order reversing the dismissal and "referr[ing the matter] to the Ninth Circuit Mediation Office to explore a possible resolution through mediation." [DE 147].

D. The 2011 Settlement.

After oral argument on the appeal, Plaintiffs immediately entered into arm's length negotiations with Kaplan, resulting in a tentative settlement with Kaplan The Ninth Circuit then ordered the Plaintiffs and Defendant West to submit to mediation under the supervision of Ninth Circuit Mediator Roxane Ashe, resulting eight months later in a global settlement agreement reflecting the negotiated discount-certificate settlement with Kaplan and the mediated monetary settlement with West, which the parties executed in October 2010.

In December 2010, the Ninth Circuit remanded the action for settlement-approval purposes. [DE 147]. Plaintiffs thereafter filed their Motion for preliminary approval [DE 64], which Motion the district court granted [DE 68]. Notice was then delivered to the Class, and Members were afforded the opportunity to submit claims and objections.

According to the Claims Administrator appointed by the Court, 184,496 notice packets were delivered to the Class in connection with the prior settlement. From those 184,496 notice packets, 47,542 timely claim forms were submitted, representing 57,262 bar-review-course purchases.[2]

[2] The per-Class Member computation under the 2011 Settlement—as under the 2013 Settlement Agreement—was a function of the total amount that each Class Member paid for bar-review courses. Accordingly, the 57,262 figure should be used instead of the 47,542 figure to estimate the average recovery under the prior settlement.

According to the Claims Administrator, a total of 113 exclusion requests, equal to approximately .06% of the Class, and 62 objections, equal to approximately .03% of the Class, were submitted. One of the objections, filed by Class Member Jonathan Hutcheson, purported to have been made on behalf of 209 separate Class Members. Similarly, thirty of the sixty-two Class Members who submitted objections did so to join in an objection filed by Class Member Daniel Greenberg of the "Center for Class Action Fairness." Finally, six objecting Class Members (the Grissom Objectors) filed an objection through a non-Class Member attorney, George Richard Baker.

After Class Members had been given an opportunity to submit claims, object, and/or exclude themselves, Plaintiffs filed their Motion for final approval and Motion for fees, both of which came on for hearing on June 20, 2011. [DE 74]. During the hearing, the district court denied the Motion for final approval, holding that the average recovery amount did not reasonably compare to that in other class actions involving defendant West. [DE 74 at 14:15–25]. The district court then denied as moot Plaintiffs' Motion for fees. [DE at 15:8–9]. On the same day – June 20, 2011 – the United States Supreme Court issued its decision in Wal-Mart Inc. v. Dukes, 564 U.S. 338 (2011), which has since been generally interpreted as significantly raising the standard of the commonality among

plaintiffs' claims as required by FRCP Rule 23 in order to qualify a plaintiff class for certification.

E. Return to Mediation and to the Ninth Circuit.

Following the district court's denial of final approval of the 2011 Settlement, the parties participated in a private mediation before John Francis Carroll on September 22, 2011. Shortly thereafter, on October 18, 2011, the Ninth Circuit *sua sponte* reasserted its jurisdiction and ordered the parties "to file supplemental letter briefs setting forth (i) their respective positions on the [D]istrict [C]ourt's rejection of the [prior] proposed settlement and (ii) the status of their commitment to the terms of the rejected settlement." [DE 147-8 and ER Vol. 4 at 584]. In November 2011, the Ninth Circuit resubmitted the appeal and reversed the dismissal, holding that, "[b]ecause the Stetson [P]laintiffs' interests in a monetary recovery were not represented by the plaintiffs in Rodriguez, they are not now barred from filing a claim for damages." [DE 147-12; 147-13]. At that point, instead of issuing its Mandate, the Ninth Circuit again "refer[red matters] to the Ninth Circuit Mediation Office to explore a resolution through mediation." [DE 147-13]. The parties thus resumed active, arm's length negotiations before the appointed Ninth Circuit Mediator.

Ultimately, after more than ten months of negotiation under the Ninth Circuit Mediator's supervision in this second go-round, and over a year after their

work with Mr. Carroll, the parties agreed to settle this matter for $9.5 million. This is $4.215 million more than the "face" amount of the earlier proposed settlement, and it is made up of all cash, meaning that there are no Kaplan discount certificates involved in the current settlement.

Following the execution of the 2013 Settlement Agreement, the Ninth Circuit issued its Mandate returning jurisdiction to district court on February 7, 2013. [DE 130]. Plaintiffs filed their Motion for Preliminary Approval the following week, which the district court granted on April 19, 2013, conditionally certifying the same Class proposed under the 2011 settlement.

The $4.215 million increase to the cash value of the 2013 Settlement was the result of Class Counsel's zealous advocacy over a year of private and Ninth Circuit-supervised mediation following denial of final approval of the 2011 Settlement. In this regard, at no point in the interim did the Grissom Objectors take any formal action whatsoever on behalf of Plaintiffs or the putative Class, whether before the district court, before the Ninth Circuit, or during the resumed mediation. Indeed, at no point from the date that the district court rejected the prior settlement through the date that the Motion for Preliminary Approval of the new settlement was filed, did any Objector seek to intervene in this case or make *any* attempt to participate in the year-long mediation process leading up to the

2013 Settlement. Indeed, none of the Grissom Objectors even bothered to submit claims.

F. Approval of the 2013 Settlement.

On April 19, 2013, the district court preliminarily approved a Stipulation and Settlement Agreement ("2013 Settlement Agreement") between Appellants, on the one hand, and Defendants West and Kaplan, Inc. ("Kaplan"), on the other hand. [District Court Case No.: CV-08-00810] (hereinafter "Stetson"); [DE 145, Order Granting Motion for Preliminary Approval of Class-Action Settlement]. The 2013 Settlement Agreement resolved Appellants' claims for damages and injunctive relief in connection with violations of federal antitrust law stemming from, among other things, a purportedly illegal market-division agreement between West and Kaplan.[3]

Under the terms of the 2013 Settlement Agreement, West and Kaplan agreed to an all-cash settlement distribution of $9.5 million, an increase of $4.215 million above the cash value of the 2011 Settlement. [DE 139-1, Stipulation and Settlement Agreement, 7 of 37]. By way of Plaintiffs' Motion for Award of

[3] This was the second settlement reached in this action. The initial settlement ("2011 Settlement"), to which the district court gave preliminarily but not final approval, provided that (a) West was to establish a cash settlement fund of $5.285 million for the benefit of the Class, and (b) Kaplan was to provide over 180,000 discount certificates to the Class with a total estimated value of at least $2.82 million. These two parts of the 2011 Settlement combined for a total value of at least $8,105,000. [DE 68]

Attorney's Fees and Reimbursement of Costs, Class Counsel sought attorney's fees of approximately 20% of the Gross Settlement Fund, $1.9 million, and reimbursement for incurred litigation expenses of $49,934.89. [DE 146, ER Vol 4 at 0597]. This award was less than the 25% Fee Award contemplated by the 2013 Settlement Agreement, and fell below the 25% "benchmark" established by the Ninth Circuit for common-fund cases.

The district court ruled that the fee should be but $585,000 and limited reimbursement of costs to $20,588.17 (the "Initial Fee Award"). [Vol 2 at 0250-51 and 0259].

G. Reversal of the 2013 Fee Award and Subsequent Proceedings.

This Initial Fee Award was deemed erroneous on May 5, 2016, when the Ninth Circuit vacated the fee award, holding that the "award of costs and fees to Class Counsel is vacated as arbitrary and remanded for further reconsideration. On remand, the district court should (1) clearly provide reasons for the factors in its lodestar computation; (2) expressly consider both a risk multiplier and the Kerr factors; and (3) base its decision on facts supported by the record." Stetson v. Grissom, 821 F.3d 1157, 1167 (9th Cir. 2016).

In response to the foregoing, this case was reassigned and the following was issued on June 10, 2016:

> NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. The Court has reviewed the Mandate issued by the Ninth Circuit Court of Appeals on June 6, 2016. Not later than June 22, 2016, the parties may file supplemental briefs, not to exceed 10 pages, regarding the award of attorneys fees and costs to Class Counsel and the denial of attorneys fees to Objectors. The matter will then be deemed submitted and the Court will issue a determination.

[DE 208; ER Vol. 4 at 0718-19].

After submission of the requested briefs, without oral argument, the district court issued the Second Fee Award, from which this appeal is taken.

SUMMARY OF THE ARGUMENT

A. *The Court Failed To Justify Use of the Lodestar Instead of the Percent of Recovery Method.*

In Grissom, this Court vacated the Initial Fee Award, determining that the district court should make an independent determination of whether to use the lodestar or percent of the recovery method in setting the fees in this case. The analysis must include a finding regarding the "special considerations" warranting the use of one method over the other. The "Ninth Circuit law mandates use of the percentage method in common fund cases unless the district court finds special considerations that warrant the use of the lodestar method." Rodriguez v.

Cleansource Inc., 2014 WL 3818304 at 4 (S.D. Cal. Aug. 4, 2014) (citing In re: WA Public Power Supply System Securities Litigation, 19 F.3d 1291, 1296 (9th Cir.1994)). Here, the Second Fee Award cut the requested fee by more than half, yet failed to make the mandatory finding of "reasons . . . based on facts supported by the record." Grissom, 821 F.3d at 1167.

B. *The District Court Failed to Properly Analyze the Hourly Rates.*

The Second Fee Award ignored substantial record evidence supporting the requested hourly rates, with the district court instead focused on the Real Rate Report, a privately published analysis which is not in the record. The district court concluded the Class Counsel's hourly rates were artificially high in order to reflect risk, thereby avoiding the Grissom command to apply a risk multiplier to the lodestar were three factors found present:

> "The district court *must* apply a risk multiplier to the lodestar 'when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky.' Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion." *Stanger*, 812 F.3d at 741 (quoting *Fischel*, 307 F.3d at 1008) (emphasis added)

Grissom, 821 F.3d at 1166. Here, Class Counsel took the case on the expectation of a risk enhancement, the hourly rate did not reflect the risk, and the case was, in fact, risky, being dismissed on the pleadings and then having to overcome, for example, new law such as in Dukes, a case which indicated that perhaps fifty-one class representatives were required here, where there were fifty-one separate markets, one for each state and the District of Columbia.

C. The District Court Misapplied the Kerr factors

On remand, Grissom directed the district court to " (2) expressly consider both a risk multiplier and the *Kerr* factors," with attention to In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935 (9th Cir. 2011). Grissom, 821 F.3d at 1167. Grissom found that "Class Counsel provided a detailed analysis of these factors on pages 16-21 of their motion for attorney's fees; the district court briefly mentioned the factors and then, without any analysis, dismissed them." This Court then held that, "the district court 'must explicitly discuss why the *Kerr* reasonableness factors do or do not favor applying a multiplier (positive or negative) in this case.'" Id. Instead, the Second Fee Award erred by, for example, focusing the analysis of the risk of nonpayment of fees to the fact that "there is no indication of such risk. Defendants are well-established corporations that show no evidence of financial strain or hardship." [ER Vol. 1 at 0006]. The risk of nonpayment includes both the possibility that a plaintiff will not make any

recovery as well as the possibility that the defendant will be insolvent. In re: Cathode Ray Tube (CRT) Antitrust Litigation, 2016 WL 4126533,*4 (N.D. Cal. Aug. 3, 2016) (Kerr factors include the contingent nature of the fee).

D. The District Court Erred in Analysis of Class Counsel's Costs.

The Second Fee Award correctly recognized that in Grissom, "the Ninth Circuit found the trial judge's ruling clearly erroneous and pointed to a declaration submitted on August 12, 2013, providing 'almost two full pages explaining how these experts were used and why their input was crucial or indispensible.' (Remand Opinion (DE 205) at p. 15.)" [ER Vol. 1 at 0006]. The Second Fee Award misinterpreted the evidence and disregarded the findings in Grissom.

ARGUMENT

A. The Court Failed To Analyse Use of the Lodestar versus Percentage of Recovery Methods.

A fundamental error in the Second Fee Award is found in the determination, without analysis, that the lodestar method of compensation rather than the traditional percentage of the recovery was appropriate in this case. In Grissom, this Court vacated the Initial Fee Award, determining that the district court should independently determine whether to use the lodestar or percent of the recovery method in setting the fees in this case. Any such analysis must include a finding regarding the "special considerations" warranting the use of one method over the

other. The "Ninth Circuit law mandates use of the percentage method in common fund cases unless the district court finds special considerations that warrants the use of the lodestar method." Rodriguez v. Cleansource Inc., 2014 WL 3818304 at 4 (S.D. Cal. Aug. 4, 2014) (citing In re: WA Public Power Supply System Securities Litigation, 19 F.3d 1291, 1296 (9th Cir.1994)). Here, the Second Fee Award cut the requested fee by more than half, yet failed to articulate the mandatory finding of "reasons . . . based on facts supported by the record." Grissom, 821 F.3d at 1167. In Gonzalez v. City of Maywood, 729 F.3d 1196 (9th Cir. 2013), the Ninth Circuit made clear that "when a district court reduces either the number of hours or the lodestar by a certain percentage greater than 10%, it must provide a *clear and concise* explanation for why it chose the specific percentage to apply," Id. at 1200 (emphasis added). The greater the deviation from the 10% threshold, the "more specific articulation of the court's reasoning is expected." Moreno v. City of Sacramento, 534 F3d. 1106, 1111 (9th Cir. 2008). The reasoning in the Second Fee Award falls short of the required "specific articulation of the court's reasoning," since the overall fee award was cut by over 50% and the Second Fee Award found the hourly rates to include any risk factor. [ER Vol. 1 at 0004].

Without any analysis of the facts, the district court held that "[h]ere, [the Initial Fee Award] used the lodestar method to calculate fees, and the Ninth Circuit found that he acted [] within his discretion to do so." Of course, however, this

Court did not mandate that the lodestar be used on remand, and the automatic adoption of the lodestar method in the Second Fee Award seems to ignore the directive which this Court gave in its decision: to render fresh, independent judgment based on the facts of this case. The analysis must include a finding regarding the "special considerations" warranting the use of one method over the other.

While the Ninth Circuit may have found that the Initial Fee Award adequately explained its choice of method before failing to properly apply the lodestar method, this does not justify deference in the Second Fee Award to the discretion articulated in the Initial Fee Award in lieu of satisfying *the district court's* obligation under the law to exercise *its own* discretion on the subject, and to articulate the reasoning which supports use of the lodestar in the Second Fee Award. This obligation of the district court to articulate for its own part whether *and* why the lodestar method is preferable to the percentage-of-the-fund method is articulated in the Grissom instruction that the district court "clearly provide reasons for the factors in its lodestar computation." One crucial "factor" is the applicability of the lodestar method in the first place.

Put another way, just because the Ninth Circuit found that the use of the lodestar method in the Initial Fee Award was within the discretion of the district court, did not relieve the district court of its obligation to review the topic *de novo*

and independently articulate the "special considerations" warranting application of the lodestar method rather than awarding a percentage of the recovery in the Second Fee Award. The district court, in preparing the Second Fee Award, had the same obligation as any other court to both exercise and explain that discretion. In that context, opting against the exercise of its inherent discretion is itself an abuse of discretion, and justifying that failure on the basis that the Initial Fee Award had so ruled is simply inadequate and improper on the ground that this matter was remanded to have the matter reviewed anew, apart from any influence from the Initial Fee Award. Grissom, 821 F.3d at 1167 ("In light of the history of this case and related litigation, it is clear to us that the district judge would have 'substantial difficulty in putting out of his . . . mind' his previously expressed, erroneous findings and conclusions, and that "reassignment is advisable to preserve the appearance of justice.")

Grissom commanded the district court on remand to evaluate the fee award apart from the "arbitrary" decision articulated in the Initial Fee Award. Id. Instead the Second Fee Award simply adopted the lodestar method from the Initial Fee Award: "Here, trial judge used the lodestar method to calculate fees, and the Ninth Circuit found that he acted well within his discretion to do so." [ER Vol 1 at 0002].

It bears pointing out that in the Initial Fee Award, the district court had opted to use the lodestar method on the basis of In re Bluetooth Headset Prods. Litig., 654 F.3d 936 (9th Cir. 2011) (hereinafter, "Bluetooth"), in which no cash was recovered for the class and a lodestar method was the sole available method for determining a reasonable fee. The Second Fee Award should have refrained from enshrining the application of so readily-distinguishable a holding.

B. The District Court Failed to Properly Analyze the Hourly Rates.

In analysis of the hourly rates, the Second Fee Award undervalued the work of senior Class Counsel and improperly conflated two issues: delay in payment and application of a risk multiplier. Although the Second Fee Award purports to accept the requested hourly rates as reasonable, it erroneously found that the rates were sub silentio enhanced by an unspoken risk multiplier. The record evidence is undisputed that Class Counsel "accepted this case on a risky, contingent fee basis . . . expecting to receive a multiplier . . . the multiplier is not reflected in the requested hourly rates." (ER Vol. 2 at 0026, p. 2:7-9) There was no basis for the conclusion that the "rates charged by the more senior attorneys (E. Disner, A. Harris, L. Owen) far exceed the prevailing hourly rates in the community for similar work." [ER Vol. 1 at 0005]. This finding was made without analysis of the evidence, relying on an unpublished volume of the Real Rate Report, proprietary material. The Second Fee Award notes that "the top third quartile of rates in Los

Angeles reach $870 for partners and $555 for associates." It also finds that "[t]he 2015 Real Rate Reports . . . state that the median rate for corporate litigation partners in Los Angeles is $670 . . associates . . . $440." [ER Vol 1 at 0004]. It seems obvious that successful prosecution of a nationwide class action with fifty-one separate submarkets is the sort of work more likely to be accomplished by counsel in the top quartile of relevant practitioners rather than in the middle of all corporate litigators.

The Ninth Circuit held that the Initial Fee Award failed to evaluate the hourly rates of Class Counsel in the context of the contemporaneous rates of relevant, similar attorneys. Grissom, 821 F.3d at 1166. The Second Fee Award does not evaluate Class Counsel's rates compared to the relevant legal market of class action, antitrust litigators in Los Angeles, but, on the one hand to all corporate litigators in Los Angeles and, on the other, to all antitrust lawyers in the country. [ER Vol. 1 at 0004] The Second Fee Award erroneously denied a fee multiplier despite the evidence that the hourly rates of senior Class Counsel Elliot Disner and Alan Harris were higher than the median rate for all corporate litigators in Los Angeles. There is a logical disconnect between the district court's recognition that, on the one hand, well more than 25% of senior Los Angeles corporate litigators indeed charge higher rates than even the two most experience of Plaintiffs' attorneys in this case, but nevertheless, Class Counsels' rates must

already reflect the risk of a massive contingency undertaking merely on the basis that they exceed an arbitrary median hourly rate for all corporate litigators in Los Angeles. Moreover, the district court ignores the fact that all of Plaintiffs' other attorneys and support staff who contributed to this case submitted hourly rates at or below the median rates to which the district court refers. For example, Perrin Disner submitted a rate of $395 per hour, a rate which is *precisely* the median antitrust Associate rate for the entire country, referenced by the district court.

1. Delay Compensation Methods

"The lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement." Grissom, 821 F3d at 1166. "The Court has the discretion to compensate counsel for a delay in payment by either awarding fees at the current hourly rate or by adding a 'prime rate enhancement' to the lodestar at the attorneys' historical rates." Whealen v. Hartford Life & Acc. Ins. Co., 2009 WL 4063166, at *5 (C.D. Cal. Nov. 20, 2009). See In re Wash. Pub. Power Supply Sys. Secs. Litig., 19 F.3d 1291, 1305 (9th Cir.1994) ("The time value of money lost by the firm is only partially recouped [by applying historical rates]. Full compensation requires charging current rates for all work done during the litigation, or by using historical rates enhanced by an interest

factor.") First, it should be noted that Class Counsel's hourly rates--both historical and current-- are reasonable. To gauge the reasonableness of Class Counsel's rates, it is appropriate to compare them with the hourly rates charged by Los Angeles firms practicing in the antitrust field. See Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008) ("Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the District Court sits."). Compared to the hourly rates at five firms with active antitrust practices in Los Angeles (Latham & Watkins, LLP, Gibson, Dunn & Crutcher, LLP, Quinn Emanuel Urquhart & Sullivan, LLP, Irell & Manella LLP, and Morrison & Foerster, LLP), Class Counsel's rates are reasonable. Partners at the five firms charged an average rate of $928 per hour in 2013. Associates charged an average rate of $533 per hour in 2013. *Billing Rates Across the Country*, National Law Journal, January 13, 2014 *available at* http://www.Nationallaw journal. Com /id=1202636785489/Billing-Rates-Acrossthe-Country?sl return =20150106200747 (accessed April 3, 2017). Weeks v. Kellogg Co., 2013 WL 6531177, at *31 (C.D. Cal. Nov. 23, 2013) (survey data may be used to determine a reasonable hourly rate). Principal Los Angeles defense counsel in this case were Munger, Tolles and Olson, found to be charging – for work in 2013 – between $445 and $920 per hour. (ER Vol. 2 at 0131; Harris Decl., Ex. 9) As set forth in the 2013 Harris and Disner Declarations, the average rates for partners and associates in Class Counsel firms

are lower than the average rates cited above, both in 2013 *and* currently. [DE 149 and 150].

2. Delay Compensation Method 1: Current Rates Applied to All Hours Billed During the Course of the Litigation

To arrive at the appropriate lodestar, most courts apply counsel's current hourly rates to all hours billed during the course of the litigation. Benson v. Cont'l Cas. Co., 592 F. Supp. 2d 1274, 1279 (C.D. Cal. 2009). In connection with their Fee Motion, Class Counsel submitted declarations detailing the total hours worked, applying then current hourly rates. [DE 149 and 150, ER Vol. 3 at 0307-24 and 0515-520]. The June 22, 2016 Harris Declaration brings the analysis up to date, applying current hourly rates. Utilizing Class Counsel's current rates yields an enhanced lodestar of $1,040,166. This updated analysis gives no credit to over three hundred hours of additional work since the May 6, 2013 Fee Motion. (ER Vol. 2 at 0030-31]. Applying a multiplier of 1.82 to the adjusted lodestar confirms that the fee request here, $1,900,000, is reasonable.

3. Delay Compensation Method 2: Historical Rates Adding a Prime Rate Enhancement

The second delay compensation method adjusts the attorneys' fees by reference to a prime rate interest factor. Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc., 731 F.Supp.2d 937, 951-52 (N.D. Cal. 2010). In order to select

the appropriate interest rate, "among the valid alternatives are '(1) the cost to plaintiff's counsel of borrowing funds to support himself during the non-paying phases of the litigation; and (2) the cost of foregone interest on the money counsel would have accumulated if he had been paid throughout the lawsuit." Chalmers v. City of Los Angeles, 676 F.Supp. 1515, 1527 (C.D. Cal. 1987). A court may measure the cost of foregone interest on the money by applying the U.S. prime rate compounded annually. Theme Promotions, 731 F. Supp. 2d at 951. On February 8, 2008 when the lawsuit was filed the prime rate was 3.25%, where it remained until December 17, 2015 when it increased to 3.5%. Applying the prime interest rate compounded annually from May 6, 2013 through September 6, 2016, the earliest possible time when the fee might actually be paid, the adjusted lodestar is $1,024,614. [ER Vol. 2 at 0028-29]. The requested fee award is reasonable by reference to either method.

C. The District Court Misapplied the Kerr Factors

The relevant factors courts use in determining whether a multiplier is appropriate are set forth in Kerr v. Screen Extras Guild, Inc.. 526 F.2d 67, 70 (9th Cir. 1975). Class Counsel respectfully submits that an analysis of the Kerr factors demonstrates that the Court should award the requested $1,900,000 fee. Even using the lodestar method to the exclusion of a percentage of the recovery analysis, there seems no basis for the finding in the Second Fee Award that "neither a negative or

positive multiplier should apply based on the *Kerr* factors." [ER Vol 1 at 0005]. The Second Fee Award concludes that the Kerr factors are neutral as too much time was spent before filing the Complaint. Grissom found that "Class Counsel provided a detailed analysis of the [*Kerr*] factors on pages 16–21 of their motion for attorney's fees; the district court briefly mentioned the factors and then, without any analysis, dismissed them. On remand, the court 'must explicitly discuss why the *Kerr* reasonableness factors do or do not favor applying a multiplier (positive or negative) in this case.' *See Stanger*, 812 F.3d at 740." Grissom, 821 F.3d at 1165. The Second Fee Award failed to make the required analysis, focusing solely on the assumed fact that too much time was spent in analysis, investigation and drafting before filing the complaint.

(1) The Skill Required and Reputation of Counsel

Successful prosecution of this case required deep skill in the successful resolution of antitrust class actions, as well as a reputation for an ability to actually try such a case, were it not settled. The Fee Motion and the supporting declarations reflect that Class Counsel have such experience in prosecuting and trying class-wide claims, including antitrust matters. [Fee Motion, ER Vol. 4 at 0607:1-15; May 6, 2013 Declaration of Alan Harris, ER Vol. 3 at 0308-311; Declaration of Perrin Disner, ER Vol. 3 at 0516-518]. As those submissions demonstrate, Class Counsel have extensive and significant experience in complex class action

litigation. Further, the quality of opposing counsel is also important in evaluating the quality of the work done by Class Counsel. See, e.g., In re Equity Funding Corp. Sec. Litig., 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) ("[P]laintiff's attorneys in this class action have been up against established and skilled defense lawyers, and should be compensated accordingly"); Arenson v. Bd. of Trade, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Defendants were represented in this litigation by four major firms, each of which has a stellar reputation, Munger, Tolles, & Olson LLP, Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, Shearman & Sterling LLP and Satterlee Stephens Burke LLP. The hourly rates at the defense firms are certainly in the top quartile. None of the four defense firms would be categorized with those firms charging rates in line with the "median [or] top third quartile of rates in Los Angeles," the rates to which the Second Fee Award consigned Class Counsel. [ER Vol. 1 at 0004]. Dealing with the four defense firms made Class Counsel's tasks more challenging, increasing the difficulty and risks of the litigation. At every stage of the proceedings, Class Counsel had to perform with a high level of skill, efficiency, and professionalism. The "prosecution and management of a complex national class action requires unique legal skills and abilities." In re Omnivision Techs., Inc., 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008). The Second Fee Award ignored all of the foregoing, merely concluding that the job could have been done every bit as successfully by

an average corporate litigator, without reference to whether, for example, that individual normally dealt with basic contract disputes or other non-complex cases.

In evaluating the quality of Class Counsel's representation, the district court indicated that it "is hindered by its lack of historical knowledge in this case[]" before finding the "quality of representation" by Class Counsel to boil down to a conclusory assessment that "information provided by Objectors indicates" that Class Counsel's efforts in drafting the complaint – one early part of what is now a ten-year case – had been "excessive" and that "one of the metrics for quality of representation includes efficiency."

This perfunctory analysis ignores the record which Grissom expressly sought to draw to the district court's attention. Furthermore, the Second Fee Award seems to overlook the direction of Grissom when it reduces the entire issue of the "quality" of Class Counsel's 10-year prosecution of this lawsuit to a perfunctory finding of fact as to the inefficiency of 'Step 1', particularly when only two pages earlier the district court only saw fit to trim Class Counsel's time records by 3.5% [ER Vol. 1 at 0004] Such a modest overall reduction, were it justified, which it is not, cannot logically support a finding that Class Counsel failed to provide high quality representation in this case.

(2) Novelty of the issues presented

The Second Fee Award fount that "[w]hile antitrust litigation is inherently complex relative to other practice areas, *there is no indication* that the issues were novel." (Emphasis added.) In point of fact, the record includes many indications regarding the novelty of this case, including that the anticompetitive conspiracy at the center of this case had purportedly been terminated before this case was filed, that Kaplan was actually entering various of the state submarkets, and that the Ninth Circuit overruled the district court's order dismissing the case at the very start. There seems to be no reason for the Second Fee Award to disregard the numerous novel issues in a nation-wide antitrust case, dealing with fifty-one submarkets and the impact of recent obstacle(s) created by cases such as Bell Atlantic v. Twombly (2007), Ashcroft v. Iqbal (2009), and Wal-Mart v. Dukes (2011). See May 6, 2013 Declaration of Perrin F. Disner ISO Plaintiffs' Motion for Award of Attorney's Fees and Costs at ¶¶6-7. [ER Vol. 3 at 0519].

This was a complex antitrust case involving novel and difficult questions of law and fact. Initially, the district court dismissed Plaintiffs' claims with prejudice, principally on the ground that the Rodriguez settlement's non-monetary relief had eliminated the barriers to entry alleged in Plaintiffs' Complaint. The fact that Plaintiffs were able to negotiate a settlement after a dismissal with prejudice speaks to the uphill battle Class Counsel faced in this case. One of many great

challenges in the case included that the Defendants operated in fifty discrete submarkets. Each state has a unique bar exam, with differing competitive conditions in the various states.

Further, the initial, 2011 settlement was complex and required expert analysis in terms of valuation and fairness. The valuation established a floor for subsequent negotiations, a floor which was exceeded. The Declaration of Alan Harris submitted in support of the Fee Motion on May 6, 2013 [DE 146] details Class Counsel's investigation, procedural history and the terms of the ultimate, all cash settlement in this case. See generally May 6, 2013 Harris Decl. [ER Vol. 3 at 0307-0324]. The Fee Motion describes the substantial difficulty and risk Plaintiffs faced in this case. (See Fee Motion at ER Vol. 4 at 0604-605, pp. 16:4-17:21].

(3) Complexity

The district court states "the complexity of this case and how it bears upon attorney's fees has already been accounted for in the lodestar amount." This analysis fails to satisfy the Ninth Circuit's directive that the district court give express consideration to the substance of this factor, instead perfunctorily disposing of the question on the basis of a tangential connection drawn to another flawed analysis, the analysis of the lodestar. The hourly rates in the Real Rate Report include all sorts of corporate litigation, from the most simple to the most complex. Obviously, nationwide class actions are among the most complex of all

cases addressed in our federal system. Indeed the Manual for Complex Litigation, when discussing "Particular Types of Litigation," commences with antitrust cases, not because the matters are listed in alphabetic order but rather because the Manual itself was largely created to address the special problems involved in nationwide antitrust class actions.

(4) Undesirability of the Case

There are risks inherent in financing and prosecuting complex litigation of this type. Knowing that Defendants had a relatively unlimited budget and that they would be represented by several law firms with vast resources and experienced counsel, and knowing that potentially thousands of hours and hundreds of thousands of dollars could be spent in prosecution of the case, only those firms that concentrate in complex class actions would ever consider undertaking such representation. See also May 6, 2013 Harris Decl. [ER Vol. at 0323-24]. Here, under the scrutiny of a unique class consisting of attorneys, the undesirability of the case is firmly established by the fact that not a single copycat case was filed anywhere in the country.

(5) Risk of nonpayment

The district court states "as to risk of nonpayment, there is no indication of such risk. Defendants are well-established corporations that show no evidence of

financial strain or hardship**."** [ER Vol. 1 at 0006]. This cursory evaluation is where the district court most egregiously misunderstands and misapplies the law.

The risk a class action attorney runs, in commencing a case such as this, is not limited to the risk of nonpayment by an insolvent defendant *after winning the case*. Obviously, the risk of nonpayment includes the risk of *losing the case*. This is arguably the most important factor in the "risk multiplier" calculus which the Grissom directed the district court to perform. When the district court takes for granted that Class Counsel was always destined to be compensated for undertaking this matter on contingency, and that the only possible obstacle to that inevitability was the hypothetical bankruptcy of one of the defendants, it fundamentally misses the point.

The Ninth Circuit plainly indicated the proper approach to this question, holding "[h]ere, there is some evidence of risk—after all, the district court initially dismissed the case before being reversed on appeal[.]" The district court's entire analysis on this subject, by contrast, plainly only considers Class Counsel's risk in the context of circumstances commencing six years later, only after the parties had reached and the district court granted final approval to the 2013 settlement. In the process the district court utterly ignores the Ninth Circuit's instructive reference to the dismissal, as well as everything that followed between then and final approval of the 2013 Settlement, including, *inter alia*: intense scrutiny from a plaintiff class

comprised of 180,000 attorneys; the district court's rejection of the 2011 settlement; increased class certification obstacles created by the Supreme Court's Dukes decision; and the effort by objectors to aver their own entitlement to a share of Class Counsel's fees.

Arguably, the first point in this case at which a defendant's hypothetical insolvency genuinely became the only reason why Class Counsel might not be paid an otherwise inevitable fee did not come until June 18, 2014, when the Grissom Objectors' filed an Opening Appeal Brief which refrained from suggesting that Class Counsel should be deprived of *all* attorney's fees. Here it bears noting, especially in light of the Second Fee Award's reference to the Rodriguez case, that the Ninth Circuit has indeed affirmed the denial of all fees to certain of the plaintiffs' attorneys in that case, notwithstanding their achievement of a $49 million settlement with the same defendants at issue in the present case; clearly Kaplan's and West's financial solvency was not determinative of the risk of nonpayment to the ultimately unpaid class counsel in Rodriguez. Rodriguez v. Disner, 688 F.3d 645, 653 (9th Cir. 2012) ("A court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests.")

In the instant case, the Ninth Circuit held that "[o]n remand, the decision to apply a risk multiplier—or not—remains within the district court's discretion, but

in either event it '*must fully and adequately* explain the basis for its discretion.' Stanger, 812 F.3d at 741." (Emphasis added.) The district court's responsive explanation – merely that "Defendants are well-established corporations that show no evidence of financial strain or hardship" – is not adequate grounds for its finding of lack of risk, a plain mistake of law under Stanger, contravening the holding in Grissom.

(6) Time and Labor Required

As detailed in the Fee Motion, this case was commenced some ten years ago. Class Counsel devoted substantial time and labor to this case. Class Counsel spent 1541.2 hours working on the case just through the date of the original fee petition in 2013. The requested fee award also does not specifically account for the substantial amount of work that took place since 2013. For example, Class Counsel has expended over 300 hours on this case since May of 2013. The amount of work required to prosecute this case is ample evidence of the substantial time inherent in prosecuting a case of this nature. Class Counsel forcefully and comprehensively represented the class by reviewing and analyzing information informally provided by Defendants, overturning on appeal the district court's initial dismissal, retaining and consulting with experts, engaging in substantial law and motion practice, and conducting significant informal discovery, including telephonic and in person interviews with witnesses in Florida, Washington and California. Accordingly, the

time and labor devoted to this case, both quantitatively and qualitatively, has been quite substantial.

(7) Awards in Similar Cases

There can be no question that in similar antitrust class actions the routine award is at least 25% of the common fund. June 22, 2016, Harris Declaration, Para. 10:7-9.

D. The District Court Erred in Analysis of Class Counsel's Costs

The Second Fee Award correctly recognized that in Grissom, "the Ninth Circuit found the trial judge's ruling clearly erroneous and pointed to a declaration submitted on August 12, 2013, providing 'almost two full pages explaining how these experts were used and why their input was crucial or indispensable.' (Remand Opinion (DE 205) at p. 15.)" [ER Vol. 1 at 0006]. The Second Fee Award misinterpreted the evidence and disregarded the finding in Grissom, inexplicably deducting the cost award to Class Counsel, finding counsel should not be reimbursed for $29,346.72 in expenditures (=$49,334.89-$20,588.17) on the basis that "[c]lass counsel provides a statement specifying Dr. Rook's contribution (id. at 9), but provides no such statement regarding Drs. Safir and Gikas." [ER Vol. 1 at 0006-7].

According to the Harris Declaration:

2. After extensive pre-filing factual investigation and consideration of the law, particularly the then-recently decided decision in Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007), Class Counsel caused Plaintiffs to file the Complaint in this Action against Defendants . . . alleging claims for violation of the federal antitrust laws. Prior to filing the Complaint, Class Counsel spent a great deal of time securing a grasp of the detailed facts that had been developed by my co-counsel, Eliot Disner, in connection with his work on the related Rodriguez v. West case, Central District of California Case No. CV 05-3222 R. In addition, prior to filing the above-captioned case, Eliot Disner and I spent substantial time reviewing the state of the law regarding pleading—a review necessitated in part and resulting from Twombly. Here, determining how to approach the drafting of the Stetson Complaint was complicated by both Twombly and the fact that there was no government rubric for a complaint. My 2007 file presently contains hard copies of over twenty-six decisions (with notes) reviewed in connection with the preparation of the Stetson Complaint. Many other cases were reviewed on-line but not printed.

3. In my pre-filing discussions with Eliot Disner, we spent many hours reviewing the substance of the discovery in Rodriguez—focusing on various damage and standing theories that we might pursue in Stetson and on our communications with potential class representatives—and also reviewing Twombly and its emerging progeny. Prior to the filing of this case, Eliot Disner and I gave substantial consideration to exactly how we might prove damages in our case—a process that was obviously complicated by fact that many of the most important liability events were relatively remote from the Stetson Class Period and the fact that, after Rodriguez, Defendants formally severed their anticompetitive market-division agreement.

. . .

Class Counsel's Experts

7. My discovery efforts in Stetson included extensive communications with our consulting experts, Dr. Andrew Safir and Dr. James Gikas of Recon Research, and Professor Dennis Rook of the University of Southern California ("USC"). These communications spanned the time from before the filing of the Complaint to meetings within the past week. Particularly in light of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), in undertaking a case

such as Stetson, I think it is important to begin thinking about proof of damages even before filing the case, and, in this situation, that is exactly what I did, as is reflected, for example, in the time I spent with Eliot Disner, working on the damage issues, in 2007.

8. Dr. Safir is the President of Recon Research, an economic consulting firm that he founded in 1980. He has a Doctor of Philosophy degree in Economics from Tufts University. Prior to founding Recon, Dr. Safir held a variety of positions with the federal and California governments. In 1972, he was appointed as a staff member to the President's Council of Economic Advisers, and, in mid-1973, he joined the White House Council on International Economic Policy as a professional member specializing in finance. In 1974, he moved to the Department of Justice, where he served as the senior economic advisor to the Office of Justice Policy, Planning and Research. In 1975, he was appointed as the Assistant Director of the Office of International Energy Policy at the U.S. Treasury. He left that position in 1978 to accept appointment as the Chief Business Economist for the State of California. A sample of his testimony experience during the period between January 2003 and 2007 is attached here as **Exhibit 3**. Dr. Gikas holds a Doctor of Philosophy

degree in Economics from the University of California, Los Angeles. He has been employed at Recon Research since 1991. Both Dr. Safir and Dr. Gikas have testified for Harris & Ruble clients in other class actions, and, in the course of this case, I have productively consulted with them on damage issues.

. . .

10. Prior to commencement of settlement negotiations, I consulted with our experts regarding both the range of possible damages and the various ways in which settlement might be achieved. As a result of those discussions, a settlement strategy was developed to focus on Kaplan and a possible settlement that would include the use of coupons. This approach would have two benefits: (1) it is a "divide-and-conquer" strategy that might split Kaplan from West, ending their strategy from refusing to discuss any settlement whatsoever; and (2) it might lead to widespread distribution of coupons for use in purchasing competing Kaplan bar-review courses, thereby hastening competition in the field. Because liability may be joint and several in many antitrust violations, offering a discounted settlement to one of two or more defendants is a time honored strategy in resolving antitrust

> cases. E.g., In re Corrugated Container Antitrust Litig., 643 F.2d 195, 209 (5th Cir. 1981).

[ER Vol. II – 0298-99 and 0301-02]. Drs. Safir and Gikas acted as consulting economists, working together at the same firm, Recon Research. The Second Fee Award incorrectly states that "[t]he only statement that possibly related to Drs. Safir's and Gikas's contributions is contained in two sentences: 'Prior to the commencement of settlement negotiations, I consulted with our experts regarding both the range of possible damages and the various ways in which settlement might be achieved. As a result of those discussions a settlement strategy was developed to focus on Kaplan and a possible settlement that would include the use of coupons." [ER Vol. 1 at 0007]. In fact, at the above Harris Declaration makes clear, the consultations with Recon Research involved more than the coupon issue and settlement negotiations. Again, according to the Harris Declaration: "My discovery efforts in Stetson included extensive communications with our consulting experts, Dr. Andrew Safir and Dr. James Gikas of Recon Research . . . These communications spanned the time from before the filing of the Complaint to meetings within the past week. Particularly in light of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), in undertaking a case such as Stetson, I think it is important to begin thinking about proof of damages even before filing the case, and, in this situation, that is exactly what I did." [ER Vol. II – 0298-99].

The amount at issue, less than $30,000, represents less than 1/3 of 1% of the total $9,500,000 recovery. It should be awarded as a reasonable reimbursement of expenses.

CONCLUSION AND RELIEF REQUESTED

The district court's denial of Class Counsel's fee petition was factually and legally unsound, and is properly subject to reversal. For the foregoing reasons, Appellants respectfully request that the order of the district court be vacated. Appellants respectfully request that this Court approve Class Counsel's request for $1.9 million in attorney's fees and $49,934.89 in incurred costs from the $9.5 million common-fund settlement.

DATED: April 3, 2017

Respectfully submitted,

HARRIS & RUBLE

/s/ *Alan Harris*
Alan Harris
Attorneys for Appellants

STATEMENT OF RELATED CASE

Rodriguez v. West Publishing Corp.,C.D. Cal. Case No. 5-cv-03222.

CERTIFICATE OF COMPLIANCE

Pursuant to FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) and Ninth Circuit Rule 32-2, I certify that the attached brief is proportionally spaced, has a typeface of 14 points, contains a total of 44 pages, and contains approximately 9,929 words.

DATED: April 3, 2017

Respectfully submitted,

HARRIS & RUBLE

/s/ *Alan Harris*
Alan Harris
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the CM/ECF filing system and that service will be accomplished by way of the CM/ECF system.

DATED: April 3, 2017

Respectfully submitted,

HARRIS & RUBLE

/s/ *Alan Harris*
Alan Harris
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