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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

TERRI N. WHITE, ET AL.,

Plaintiffs,

vs.

**EXPERIAN INFORMATION
SOLUTIONS, ET AL.,**

Defendants.

Case No.: SACV 05-01070 DOC(MLGx)

**ORDER DENYING MOTION TO
DISQUALIFY [875], DENYING MOTION
TO APPOINT INTERIM CLASS
COUNSEL [878], AND GRANTING
CROSS-MOTION TO APPOINT
INTERIM CLASS COUNSEL [885]**

Before the Court is the Motion to Disqualify Hernandez Counsel (Dkt. 875) and Application to Serve as Interim Class Counsel (Dkt. 878) filed by Plaintiffs Terri N. White, et al., and a Cross-Motion to Appoint Interim Class Counsel (Dkt. 885) filed by Jose Hernandez, et al. The Court heard oral argument on these matters on August 14, 2013. After considering the moving and opposing papers and the arguments of counsel, the Court hereby DENIES the Motion to Disqualify (Dkt. 875), DENIES White Plaintiffs' Motion to Appoint Interim Counsel

(Dkt. 878), and GRANTS Hernandez’s Cross-Motion to Appoint Interim Class Counsel (Dkt. 885).

I. Factual and Procedural Background

a. Initiation of the Lawsuit

The instant lawsuit is an amalgamation of several separate suits filed in 2005 and 2006. The *White* lawsuit began with Charles Juntikka and Daniel Wolf, who noticed and recorded problems with Mr. Juntikka’s bankruptcy clients’ credit reports. Five of these clients eventually became lead plaintiffs: Maria Falcon, Chester Carter, Arnold Lovell, Jr., Clifton C. Seale, III, and Robert Radcliffe (collectively, “White Plaintiffs”). In October 2005, Mr. Juntikka and Mr. Wolf recruited Leiff, Cabraser, Heimann, & Bernstein, LLP (“Leiff Cabraser”) to prosecute the White Plaintiffs’ claims as a class action. The *White* case was then consolidated with a parallel class action in the Northern District of California in which Jose Hernandez was the named plaintiff. The law firm Caddell & Chapman, P.C. (“Caddell”) represented Hernandez, as did attorney Leonard Bennett. The cases were consolidated and jointly prosecuted in the Central District of California, along with three other related cases. Caddell and Leiff Cabraser also authorized the National Consumer Law Center to appear on behalf of both plaintiffs. *See* First Decl. of William B. Rubenstein (“First Rubenstein Decl.”) (Dkt. 621) ¶ 13. The Leiff-Caddell team (“Settling Counsel”) became lead counsel in the consolidated law suit.

In the consolidated lawsuit, Plaintiffs Jose Hernandez, Kathryn Pike, Robert Randall and Bertram Robison (collectively, “Settling Plaintiffs”) brought suit against Defendants Experian Information Solutions, Inc. (“Experian”), Equifax Information Services, LLC (“Equifax”) and Trans Union, LLC (“Trans Union”) (collectively, “Defendants”). The suit alleged that Defendants had recklessly and/or negligently violated—and were continuing to recklessly and/or negligently violate—the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681 *et seq.* Plaintiffs claimed that the credit-reporting agencies issued credit reports that inaccurately listed outstanding debts that were discharged in bankruptcy. A subset of the plaintiffs also claimed that Defendants did not adequately investigate the errors even after consumer disputes over the status of the discharged debts. Plaintiffs brought causes of action for (i) willful and/or negligent

1 violation of Section 1681e(b) of the FCRA and its California counterpart, California Civil Code
2 Section 1785.14(b), (ii) willful and/or negligent violation of Section 1681i of the FCRA and its
3 California counterpart, California Civil Code Section 1785.16, and (iii) violation of California
4 Business & Professions Code Section 17200 *et seq.*

5 b. Litigation and Settlement

6 The parties briefed motions for class certification and summary judgment. At the hearing
7 on class certification, the Court issued a tentative order denying certification. *See Minutes of*
8 *Motion Hearing Re: Motions to Certify Class*, January 26, 2009 (Dkt. 369); *Tentative Order*
9 *(Dkt. 369-2)*. The parties entered mediation on August 15, 2007. The mediation process was
10 exhaustive, including seven in-person sessions with mediator Hon. Lourdes Baird (Ret.), five in-
11 person sessions with mediator Randall Wulff, and various other in-person and telephonic
12 meetings involving counsel for the parties.

13 In August 2008, the parties reached an injunctive relief settlement. The Court approved
14 that settlement on August 19, 2008. *See Approval Order Regarding Settlement Agreement and*
15 *Release*, Aug. 19, 2008 (Dkt. 338). The injunctive relief settlement contained far-reaching relief
16 for the class, including retrospective changes to class members' credit reports as well as new
17 procedures going forward. No one objected to the injunctive relief settlement.

18 On February 5, 2009, the parties reached a monetary settlement. The settlement created a
19 \$45 million award fund inclusive of fees and costs, with \$15 million to be contributed by each
20 defendant. After administrative costs, class members able to demonstrate actual harm would
21 receive "actual-damage awards." When this Court approved the settlement, there were roughly
22 15,000 Actual Damages Awards claimants: 2,141 claimants who were denied employment and
23 were therefore eligible for a minimum award of \$750; 5,593 claimants who were denied a
24 mortgage or housing rental and were therefore eligible for a \$500 minimum award; and 7,600
25 claimants who were denied credit or auto loans and were therefore eligible for a \$150 minimum
26 award. *Decl. of J. Keough Re Final Report of Supp. Claims*, May 2, 2011 ("May 2, 2011
27 *Keough Decl.*") (Dkt. 751) ¶ 8.

1 Class members unable to show actual damages could apply for a Convenience Award,
2 requiring only that they file an attestation that they believe they are members of the class. At the
3 time the Court approved the settlement, roughly 754,783 class members had submitted a claim
4 for a Convenience Award. *Id.* This would have yielded a recovery of roughly \$26.78 per
5 Convenience Award claimant. *Id.* Following these distributions, the Settling Fund was to pay
6 the class representatives and class counsel.

7 Settling Counsel informed the White Plaintiffs of the settlement on February 6, 2009.
8 First Decl. of Charles Juntikka, Esq. Ex. A (“First Juntikka Decl.”) (Dkt. 555) ¶ 4. White
9 Plaintiffs objected to the monetary relief settlement. *See* First Juntikka Decl. Ex. J. Among the
10 objections asserted was “that the Settlement would release the meritorious claims of each
11 member of three separate 10 to 15 million-member classes for an award averaging less than 1%
12 of the \$100 statutory minimum to which they were entitled.” Motion to Disqualify Counsel at 3.

13 On April 16, 2009, Settling Counsel added a provision to the draft settlement that
14 required Settling Counsel to “file an application or applications to the Court for an incentive
15 award, to each of the Named Plaintiffs serving as class representatives in support of the
16 Settlement, and each such award not to exceed \$5,000.” Second Decl. of Charles Juntikka, Esq.
17 (“Second Juntikka Decl.”) (Dkt. 877) Ex. A at 5. White Plaintiffs objected to the incentive
18 award provision, arguing that it created a conflict of interest for Settling Counsel and any
19 settling representatives by setting the interests of the named plaintiffs and the absent class
20 members at odds. This Court approved the monetary settlement with the incentive provision on
21 July 15, 2011. *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1090-91 (C.D.
22 Cal. 2011) *rev’d and remanded sub nom. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d
23 1157 (9th Cir. 2013).

24 c. Appeal and Ninth Circuit Opinion

25 On appeal, the Ninth Circuit reversed and vacated the settlement. *Radcliffe v. Experian*,
26 715 F.3d 1157 (9th Cir. 2013). The Ninth Circuit held that the incentive awards rendered the
27 class representatives who signed onto the settlement inadequate under Rule 23(a)(4). *Id.* at
28 1165. The Circuit further held that “the class representatives’ lack of adequacy—based on the

1 conditional incentive awards—also made class counsel inadequate to represent the class.” *Id.* at
2 1167. Applying California law, the Court held that “[a]s soon as the conditional-incentive-
3 awards provision divorced the interests of the class representatives from those of the absent class
4 members, class counsel was simultaneously representing clients with conflicting interests,”
5 without a waiver. *Id.* In light of this conflict, the Court determined that Settling Counsel was
6 “not adequate and could not settle the case on behalf of the absent class members.” *Id.*

7 The Circuit vacated the class settlement, including costs and fees, and remanded for
8 further proceedings. The Circuit directed this Court on remand to determine: “when the conflict
9 arose, if the conflict continues under any future settlement agreement, and how the conflicted
10 representation should affect any attorneys’ fees awards.” *Id.* at 1168. The Circuit further noted
11 that this Court must address whether “the subset of class counsel who brought the *Acosta* and
12 *Pike* suits, which were consolidated with this case, faced an independent conflict of interest
13 because of the fee-sharing agreement they executed with the rest of class counsel.” *Id.* at 1168
14 n.6. Most of these issues are not ripe for resolution on the current motions.

15 On June 19, 2013, White Counsel filed the instant Motion to Disqualify Hernandez
16 Counsel (Dkt. 875) and Application to Serve as Interim Class Counsel (Dkt. 878). Settling
17 Counsel filed an Opposition to the Motion to Disqualify (Dkt. 884) and filed a Response to
18 Motion to Appoint Interim Counsel with a Cross-Motion to appoint the Settling Counsel as
19 interim class counsel (Dkt. 885). The Court heard oral argument on these matters on August 14,
20 2013.

21 **II. Motion to Disqualify Settling Counsel**

22 White Counsel move to disqualify Settling Counsel under California law. White Counsel
23 argue this disqualification is mandatory. Settling Counsel respond that disqualification is not
24 mandatory and is not warranted. The Court agrees with Settling Counsel on both issues.

25 As an initial matter, however, the Court disagrees with Settling Counsel that the Ninth
26 Circuit already decided this issue. Settling Counsel do not identify whether their argument is
27 based on a form of preclusion, the law of the case, or the rule of mandate, and so it is difficult to
28 evaluate this claim fully. It appears to the Court that the disqualification issue was referenced in

1 the briefs before the Ninth Circuit, but the question was not actually raised to the panel. *See*
2 Opp’n (Dkt. 886) Ex. 1 at 26-35. Even if the disqualification issue had been raised, the Circuit
3 made no holding on the question in its opinion. *See* 18B Charles Alan Wright & Arthur R.
4 Miller, *Federal Practice & Procedure Jurisdiction* § 4478 (2d ed.) (footnotes omitted)
5 (“[D]ecision of one issue does not ordinarily imply decision of another, and failure to respond to
6 a position taken in dissent does not imply a decision contrary to the dissent.”). Settling Counsel
7 makes no convincing argument that this issue was somehow implicitly decided. *See Thomas v.*
8 *Bible*, 983 F.2d 152, 154 (9th Cir. 1993). Therefore, the Court proceeds to resolve the
9 disqualification question in the first instance.

10 a. Identifying the Correct Legal Standard: Automatic Disqualification or
11 Balancing the Interests?

12 The Court first must address Counsels’ disagreement over whether California’s automatic
13 disqualification rule applies.

14 i. California Law Governs

15 In cases considering conflicts of interest in attorney representation, the Ninth Circuit
16 refers to the local rules of the district to determine what standards govern an ethical violation.
17 *See Rodriguez v. W. Publ’g Corp. (Rodriguez I)*, 563 F.3d 948, 967 (9th Cir. 2009) (“By virtue
18 of the district court’s local rules, California law controls whether an ethical violation
19 occurred.”); *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir.
20 1998) (citing N.D. Cal. Local Rule 110-3) (“[S]tandards of professional conduct in the Northern
21 District are those of California Rules of Professional Conduct.”); *Paul E. Iacono Structural*
22 *Eng’r, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983) (“In the absence of rules
23 promulgated by higher authorities in the judicial system, the district courts are free to regulate
24 the conduct of lawyers appearing before them.”).

25 The Central District of California’s Local Rule 83-3.1.2 identifies “the standards of
26 professional conduct required of members of the State Bar of California and contained in the
27 State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the
28 decisions of any court applicable thereto” as the “standards of professional conduct” in the

1 district. C.D. Cal. R. 83-3.1.2. Thus, California law governs our analysis in this case.

2 “[B]ecause we apply state law in determining matters of disqualification, we must follow the
3 reasoned view of the state supreme court when it has spoken on the issue.” *In re Cnty. of Los*
4 *Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). *But see Rodriguez v. Disner (Rodriguez II)*, 688
5 F.3d 645, 656 n.7 (9th Cir. 2012) (citing C.D. Cal. R. 83-3.1.3) (“However, the decision whether
6 to sanction or impose other discipline is a question of federal law.”).

7 ii. Automatic Disqualification is the Default Rule

8 Next, the Court must determine the proper analysis for a concurrent conflict in the class
9 action context. White Counsel argue that the proper rule is automatic disqualification, while
10 Settling Counsel argue that the rule is a balancing test.

11 The Ninth Circuit held that Settling Counsel violated California Rule of Professional
12 Conduct 3-310(C) because the incentive agreements made the class representatives’ interests
13 diverge from those of the absent class plaintiffs, putting counsel in the position of representing
14 two clients with opposing interests without a waiver. *Radcliffe*, 715 F.3d at 1167. Rule 3-
15 310(C) addresses two forms of conflict involving representation of multiple clients with adverse
16 interests: representing two clients with adverse interests simultaneously, and representing a
17 client when a lawyer has obtained confidential information from a former client that is relevant
18 to the current action. Cal. Rules of Prof. Conduct 3-310(C), (E). The incentive provisions
19 created a question of actual concurrent conflict under 3-310(C)(2).

20 The default rule for a concurrent conflict in California is automatic disqualification in all
21 but a small number of cases. *See Blue Water Sunset, LLC v. Markowitz*, 192 Cal. App. 4th 477,
22 486-87 (2011) (“If an attorney simultaneously represents two clients with adverse interests,
23 automatic disqualification is the rule in all but a few instances.”). The disqualification rule in
24 the case of a concurrent conflict is strict and requires disqualification in nearly every case. *See*
25 *People ex rel. Dep’t of Corporations v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147
26 (1999) (noting that when a lawyer represents “clients whose interests are directly adverse in the
27 same litigation . . . the rule of automatic disqualification applies”); *Flatt v. Superior Court*, 9
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1 Cal. 4th 275, 282-85 (1994) (“Indeed, in all but a few instances, the rule of disqualification in
2 simultaneous representation cases is a *per se* or ‘automatic’ one.”).

3 Settling Counsel argue that the default rule is a balancing test using general principles of
4 California disqualification law, under which disqualification is discretionary. California law
5 does provide a set of broad principles for courts to apply when considering motions to
6 disqualify. California law states, for example, that the power to disqualify is discretionary, and
7 should depend on the specific circumstances of each case. *See Oaks Mgmt. Corp. v. Superior*
8 *Court*, 145 Cal. App. 4th 453, 462 (2006); *William H. Raley Co. v. Superior Court*, 149 Cal.
9 App. 3d 1042, 1048 (1983). California law directs courts to weigh several factors to make this
10 determination. *See Raley*, 149 Cal. App. 3d at 1048. California law also generally disfavors
11 motions to disqualify. *Sharp v. Next Entm’t, Inc.*, 163 Cal. App. 4th 410, 424 (2008). Settling
12 Counsel argue that the balancing test described by these general principles is the rule the Court
13 should apply to the conflict in question.

14 However, these broad disqualification principles give way to narrower, more specific
15 rules in the case of attorney-client conflicts. Case law addressing concurrent conflicts under
16 Rule 3-310(C) cite these general principles as a preface to the more specific rules governing
17 conflicts. *See Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1104 (N.D. Cal.
18 2003) (describing legal standard for motions to disqualify and then stating that under Rule 3-
19 310(C), “[w]hen evaluating whether a law firm may concurrently represent two clients . . . it is
20 presumed that the duty of loyalty has been breached and counsel is automatically disqualified.”);
21 *Speedee Oil*, 20 Cal. 4th at 1145-48 (reviewing general disqualification rules before articulating
22 the automatic disqualification rule in the case of a concurrent attorney-client conflict); *Oaks*
23 *Mgmt. Corp.*, 145 Cal. App. 4th at 463-64 (discussing general principles as a preface to
24 describing the specific rules for concurrent and successive representation). General principles
25 may govern the majority of disqualification issues, but they yield to narrower rules when an
26 attorney-client conflict is at issue. When that conflict is a concurrent conflict, automatic
27 disqualification is the governing rule. Whether that rule also governs class action conflicts and
28 this case, however, is a different question.

iii. Whether Automatic Disqualification Applies in This Case

Although the default rule for concurrent conflicts is clear in traditional litigation, it is less clear that the same standard should apply in class action cases. The case law is mixed in the class action context, and the cases interpreting Rule 3-310(C) are not factually similar to our situation. Settling Counsel argue that the automatic disqualification rule should not apply in class action cases, and that the Court should instead adopt a liberal application of conflict rules in the class action context. *See Lazy Oil Co. v. Witco Corp.* 166 F.3d 581, 589 (3d Cir. 1999) (quoting Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 127 (1996)) (“Moreover, the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules.”); *In re “Agent Orange” Prod. Liab. Litig.* 800 F.2d 14, 19 (2d Cir. 1986) (“Thus, we conclude that the traditional rules that have been developed in the course of attorneys’ representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation.”); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 165 (3d Cir. 1984) (Adams, J., concurring) (“Similarly, although the importance of maintaining client confidences cannot be minimized, a rigid ‘prophylactic rule’ in the area of client confidentiality in class actions would appear to be inappropriate.”). White Counsel disagree and argue that automatic disqualification applies.

1. Legal Context

Because the proper application of California law is unclear in this case, the Court conducts a brief review of relevant case law to determine how to proceed.

First, California case law heavily emphasizes the importance of the policy considerations underlying the automatic disqualification rule. The California Supreme Court wrote that the duty of loyalty is crucial to “avoid undermining public confidence in the legal profession and the judicial process.” *Speedee Oil*, 20 Cal. 4th at 1146. California law protects this interest vigorously, such that even withdrawing from representation of one client is not sufficient to cure the conflict – the “hot potato rule.” *Flatt*, 9 Cal. 4th at 288.

1 California precedent also emphasizes that, regardless of the intention or motivation of the
2 lawyers involved, protecting a client's expectation of undivided loyalty is the paramount
3 concern. *See id.* at 289 ("The rule is designed not alone to prevent the dishonest practitioner
4 from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a
5 position where he may be required to choose between conflicting duties, or be led to attempt to
6 reconcile conflicting interests."). The *Cal Pak* decision encourages courts to be particularly
7 vigilant in the class action context to protect the loyalty interests of absent plaintiffs. *See Cal*
8 *Pak Delivery, Inc. v. United Parcel Serv., Inc.*, 52 Cal. App. 4th 1, 11 (1997). The Ninth Circuit
9 echoes this concern. *See Radcliffe*, 715 F.3d at 1168 (quoting *In re Bluetooth Headset Products*
10 *Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)) ("We must be vigilant in guarding against
11 conflicts of interest in class-action settlements because of the 'unique due process concerns for
12 absent class members' who are bound by the court's judgments.").

13 In practice, however, California case law does not provide clear guidance on how courts
14 should wield the automatic disqualification rule in class action cases. Certainly courts can and
15 do disqualify class action counsel for egregious misconduct, as in *Cal Pak*. *See Cal Pak*, 52 Cal.
16 App. 4th at 11 (disqualifying counsel in "sui generis" situation in which plaintiff's counsel
17 "[s]urreptitiously contact[ed] the opposing party and offer[ed] to dismiss a client's action or
18 forego filing a valid cause of action in return for payment of fees directly to the attorney"). The
19 *Cal Pak* court did not reference the automatic disqualification rule, but upheld the trial court's
20 decision to disqualify counsel because the trial court had "properly determined that the balance
21 of interest warranted disqualification." *Id.* at 12. *Cal Pak* is not the only class action conflicts
22 case that analyzes disqualification in a factually distinct scenario but does not clearly rely on the
23 automatic disqualification rule. In *Apple Computer*, the California Court of Appeal applied the
24 "divided loyalties rule," and cited case law relevant to the automatic disqualification rule, but
25 did not actually articulate automatic disqualification as the basis for its decision. *See Apple*
26 *Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1262 (2005) (upholding
27 disqualification under California's "divided loyalties" rule where the named plaintiff was a
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1 lawyer represented by the law firm at which he worked, and co-counsel on his case also
2 partnered with his law firm in similar lawsuits).

3 Alongside the ambiguity in *Cal Pak* and *Apple Computer*, several California cases
4 address the automatic disqualification rule but do not apply it. These cases do not abandon the
5 rule, but use it flexibly to accommodate the difficulties of class action cases. In *Koo v. Rubio's*
6 *Restaurants, Inc.*, the court found no conflict requiring disqualification because defense counsel
7 had not actually formed an attorney-client relationship with the plaintiffs, even though he
8 claimed that his law firm represented both the defendants and class members. 109 Cal. App. 4th
9 719, 726-29 (2003). The court acknowledged but did not apply the automatic disqualification
10 rule, and declined to exercise its discretion to disqualify counsel. *Id.* at 729, 735 (quoting *In re*
11 *Agent Orange*, 800 F.2d at 19) (“[T]he traditional rules that have been developed in the course
12 of attorneys’ representation of the interests of clients outside of the class action context should
13 not be mechanically applied to the problems that arise in . . . class action litigation.”). Again, in
14 *Sharp*, the court referenced but did not apply the automatic disqualification rule. *See Sharp*, 163
15 Cal. App. 4th at 428-34. Instead, the court interpreted the waiver requirement broadly to find no
16 conflict and cited *Lazy Oil* for the concept that “traditional rules of professional conduct cannot
17 be applied mechanically in the realm of class actions.” *Id.* (citing *Lazy Oil*, 166 F.3d at 589-
18 590) (declining to disqualify counsel representing class members and union that paid for the
19 lawsuit by construing waiver requirement broadly, noting that “[i]n the realm of class actions,
20 the rules of disqualification cannot be applied so as to defeat the purpose of the class
21 proceedings”).

22 The *Kullar* court acted similarly. The court declined to apply the automatic
23 disqualification rule even though plaintiffs’ counsel represented three objectors to a primary
24 class settlement while also seeking to represent two parallel classes that included individuals
25 who favored the settlement in the primary class action. *Kullar v. Foot Locker Retail, Inc.*, 191
26 Cal. App. 4th 1201, 1207 (2011). Even though some of the potential class members disagreed
27 with the objectors about the original settlement, the court found that “their common interests in
28 the outcome of the litigation [were] unaffected by that disagreement.” *Id.* at 1207 (citing *Lazy*

1 *Oil*, 166 F.3d at 589). The court wrote that “[d]isqualification under the circumstances here
2 would be no more justified than the automatic disqualification of class counsel whenever a
3 dispute arises among class members or class representatives as to the advisability of settlement.”
4 *Id.* at 1207 (citing *Lazy Oil*, 166 F.3d at 589; *Agent Orange*, 800 F.2d at 18-19; *In re Corn*
5 *Derivatives*, 748 F.2d at 162 (Adams, J., concurring)).

6 In contrast to the California class action jurisprudence, at least two district courts have
7 applied the automatic disqualification rule in the class action context. The facts of those cases
8 are very different from this one; both address class counsel representing individuals with
9 conflicting interests in two separate but parallel class actions. *See Del Campo v. Mealing*, No.
10 01-21151, at 9-10 (N.D. Cal. Sept. 29, 2011) (applying the automatic disqualification rule to
11 counsel representing two separate groups of plaintiffs in parallel class action cases); *Moreno v.*
12 *Autozone, Inc.*, No. 05-04432, 2007 WL 4287517, at *5-7 (N.D. Cal. Dec. 6, 2007) (applying
13 the automatic disqualification rule because attorneys representing objecting class members in an
14 initial class action also represented a putative class in a parallel class action that included several
15 individuals in the initial class who supported the settlement and had requested payment under
16 the settlement). These cases do not address the same type of temporary, intra-class conflict that
17 developed in this case, and so are of limited utility to the Court.

18 The Ninth Circuit has not opined on this particular issue, but its opinions in this case and
19 the *Rodriguez* cases give us a crucial piece of information about the nature of this conflict. First,
20 Ninth Circuit precedent in this case and *Rodriguez I* tell us that this type of conflict emerges as
21 soon as the incentive awards provision is in place. *See Radcliffe*, 715 F.3d at 1167 (holding that
22 Settling Counsel operated under a conflict “[a]s soon as the conditional-incentive-awards
23 provision divorced the interests of the class representatives from those of the absent class
24 members”); *Rodriguez I*, 563 F.3d at 959 (holding that conflict caused by improper incentive
25 award agreement between representatives and counsel was present “from day one” because the
26 incentive structure was written into the initial retainer agreement). In this case, the
27 corresponding date is the point at which the incentive provision appeared in the Settlement, on
28 April 16, 2009. Second, *Rodriguez II* tells us that conflicts of this nature end when the

1 offending incentive provision loses effect. *See Rodriguez II*, 688 F.3d at 652 (affirming both the
2 district court’s denial of fees to conflicted counsel for any work prior to rejection of the
3 settlement and grant of a quantum meruit award to conflicted counsel “for services provided
4 after the courts’ rejection of the incentive awards, at which point the conflict of interest had
5 come to an end”). The court enumerated this idea in a footnote, writing that “[t]he district court
6 properly determined that its rejection of the incentive awards cured any conflict of interest.” *Id.*
7 at 660 n.12. An important part of our consideration, then, is that these conflicts are unique
8 because they have expiration dates.

9 With this case law as a backdrop, the next step is to determine whether to apply the
10 automatic disqualification rule.

11 2. Discussion

12 With this legal context in mind, the Court concludes that the automatic disqualification
13 rule is not appropriate in this case. There are compelling reasons to interpret California’s
14 disqualification rule flexibly in light of California case law and these facts. First and foremost,
15 this conflict was brief and caused by a specific provision in a now-defunct settlement. Like the
16 conflict in *Rodriguez I* and *II*, this conflict was extinguished when the Ninth Circuit rejected the
17 settlement. The *Rodriguez* cases address a different legal issue—attorneys’ fees—but the logic
18 applies equally here. This conflict is almost identical to that in *Rodriguez*, but is less severe
19 because it emerged on the eve of settlement, instead of being written into the retainer agreement
20 from the beginning. In both cases, the class representatives did not have inherently opposing
21 interests from absent class plaintiffs; rather, the conflict was manufactured by the faulty
22 settlement terms.

23 Second, even if California case law on conflicts in class actions does not wholly abandon
24 the automatic disqualification rule, the analysis shows a willingness to use the disqualification
25 rules flexibly. For example, courts avoided mechanical application of waiver rules in *Sharp* and
26 rigid interpretation of a concurrent conflict in *Kullar*. Multiple cases rely on the *Agent Orange*,
27 *Lazy Oil*, and *Corn Derivatives* analysis for these ideas, and for the general concept that rigid
28 application of disqualification rules may not be ideal in the class action context. *See Kullar*, 191

1 Cal. App. 4th at 1207; *Sharp*, 163 Cal. App. 4th at 417; *Koo*, 109 Cal. App. 4th at 726. The fact
2 that this conflict was cabined and brief encourages applying a flexible test. This case is also
3 factually distinct from the district court cases applying the automatic disqualification rule. In
4 each of those cases, counsel represented overlapping groups of plaintiffs in *separate class*
5 *actions* whose interests would, by definition, conflict indefinitely. *See Del Campo*, No. 01-
6 21151, at 9-10; *Moreno*, 2007 WL 4287517, at *5-6. This conflict shares none of those traits.

7 Furthermore, the strong policy interests underlying the automatic disqualification rule
8 simply do not carry the same force when counsel inadvertently creates a temporary conflict
9 between absent class members and representative plaintiffs. The duty of loyalty is crucial in the
10 case of an attorney actively suing her client because “[a] client who learns that his or her lawyer
11 is also representing a litigation adversary . . . cannot long be expected to sustain the level of
12 confidence and trust in counsel that is one of the foundations of the professional relationship.”
13 *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 36 Cal. App. 4th 1832, 1840 (1995). But where
14 counsel is not suing his or her client, and the court faces a terminated conflict within a plaintiff
15 class, the duty of loyalty is not equivalently threatened. Similarly, there is no concern that the
16 conflict will continue to place well-meaning counsel in a position of choosing between clients.
17 The interests within the plaintiff class are no longer misaligned because the settlement is
18 expunged. *See Flatt*, 9 Cal. 4th at 289. The fact that the conflict is not ongoing and does not
19 call counsel’s loyalty into question also mitigates concerns about “public confidence in the legal
20 profession and the judicial process.” *Speedee Oil*, 20 Cal. 4th at 1146.

21 With these considerations in mind, and in light of the California precedent on this point,
22 the Court finds that it is inappropriate to rigidly apply the automatic disqualification rule to this
23 conflict. To do so would be to take a step forward in class action litigation that the California
24 courts have yet to embrace. The Court instead reverts to the balancing-of-interests analysis that
25 California courts apply outside the automatic disqualification rule. *See Sharp*, 163 Cal. App. 4th
26 at 434-36.

27 b. Legal Standard: Balancing the Interests
28

1 The power to disqualify an attorney is rooted in a court's inherent powers and is within a
2 court's discretion. *Oaks Mgmt. Corp.*, 145 Cal. App. 4th at 462 ("A judge's authority to
3 disqualify an attorney has its origins in the inherent power of every court in the furtherance of
4 justice to control the conduct of ministerial officers and other persons in pending judicial
5 proceedings."). California law also provides that "the propriety of disqualification depends on
6 the circumstances of the particular case in light of competing interests." *Id.* at 464-65 (citing
7 *Raley*, 149 Cal. App. 3d at 1048). Courts use a balancing process to decide whether
8 disqualification is proper:

9 The court must weigh the combined effects of a party's right to counsel of choice,
10 an attorney's interest in representing a client, the financial burden on a client of
11 replacing disqualified counsel and any tactical abuse underlying a disqualification
12 proceeding against the fundamental principle that the fair resolution of disputes
13 within our adversary system requires vigorous representation of parties by
14 independent counsel unencumbered by conflicts of interest.
15 *Raley*, 149 Cal. App. 3d at 1048. However, "[t]he paramount concern must be to preserve
16 public trust in the scrupulous administration of justice and the integrity of the bar." *Speedee*
17 *Oil*, 20 Cal. 4th at 1145. But, because motions to disqualify are often tactically motivated, such
18 motions are strongly disfavored and subject to "particularly strict judicial scrutiny." *Optyl*
19 *Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985)
20 (citation omitted); *see Sharp*, 163 Cal. App. 4th at 424 ("Motions to disqualify counsel are
21 especially prone to tactical abuse because disqualification imposes heavy burdens on both the
22 clients and courts . . .").

23 c. Discussion

24 The Court begins with California law's emphasis on the duty of loyalty. The prohibition
25 on concurrent representation is designed to ensure the attorney's duty of undivided loyalty, and
26 the client's legitimate expectation thereof. *Flatt*, 9 Cal. 4th at 284. "Attorneys who
27 concurrently represent more than one client should not have to choose which client's interests
28 are paramount or make a choice between conflicting duties." *Sharp*, 163 Cal. App. 4th at 428.

1 The instant conflict and the associated conduct of Settling Counsel do not seriously
2 threaten the policy concerns underlying the duty of loyalty. The ultimate impact of the conflict
3 was cabined. Unlike the incentive agreement in *Rodriguez*, this incentive award provision was
4 displayed to the Court in the Settlement Agreement soon after its drafting and after the
5 settlement terms were fully argued and agreed upon. The incentive term had no impact on the
6 settlement amount, which was well-received by a large portion of the responding class members.
7 *See White*, 803 F. Supp. 2d at 1100 (“Proportionally, the number of objectors and opt-outs
8 amounts to 0.000371% of the people who received direct notice of the Settlement and 0.2% of
9 the people who responded to the notice.”).

10 We also have the unique situation in which the loyalty in question is not split between a
11 plaintiff on one side and a defendant on the other. Instead, the conflict existed between two
12 plaintiff groups, and calls into question counsel’s loyalty to the absent class. The attorneys in
13 question have committed no other ethical violations, have vigorously litigated the claims up to
14 this point, did not enter into the improper award agreements until the eve of settlement, and
15 successfully arranged far-reaching and groundbreaking injunctive relief. The Court does not
16 find that there is a violation of loyalty to the class serious enough to warrant the same type of
17 treatment as the most “egregious” concurrent violations. Where the conflict is short-lived, did
18 not pit current clients against one another, and did not substantially affect the terms of the
19 settlement, it seems unduly harsh to punish counsel with the full weight of disqualification.

20 The Court turns to weighing a “party’s right to counsel of choice, an attorney’s interest in
21 representing a client, the financial burden on a client of replacing disqualified counsel and any
22 tactical abuse underlying a disqualification proceeding” against “the fundamental principle that
23 the fair resolution of disputes within our adversary system requires vigorous representation of
24 parties by independent counsel unencumbered by conflicts of interest.” *Raley*, 149 Cal. App. 3d
25 at 1048. This is another area in which it is difficult to apply the traditional framework of
26 conflicts analysis to the facts of a complex class action matter. Where a conflict divides
27 plaintiffs, it is difficult to determine which group is rightfully “counsel of choice,” and whose
28

1 interest in representing a client should supersede. In light of the ambiguity, the Court finds
2 those two considerations to be of reduced significance.

3 The burden on the class of replacing Settling Counsel is discounted by the fact that White
4 Counsel, at least two of whom have been a part of the litigation team from the beginning, would
5 remain involved. However, replacing the expertise and experience of Settling Counsel would be
6 challenging and costly, particularly given the long history of this litigation and its complex
7 nature. Although both counsel are skilled and experienced, Settling Counsel unquestionably
8 have more class action and consumer class action experience, including FCRA experience. To
9 disqualify them would be a serious blow to the class's legal team, weighing against
10 disqualification.

11 Measuring tactical abuse is also challenging. The two legal teams have long disagreed on
12 the best way to litigate this case. It is hard not to imagine that any motion to disqualify in such
13 cases is designed partly to serve the class and partly to gain control over a lawsuit that each
14 group feels entitled to direct. But nothing in the record or the Court's experience with counsel
15 on either side suggests bad faith or maliciousness. The Court finds tactical abuse to be a neutral
16 factor.

17 Concerns about vigorous advocacy by independent counsel do not weigh heavily in this
18 debate. As discussed previously, Settling Counsel's performance before and after the conflict
19 has left the Court with no concern about their commitment to the class as a whole. This conflict
20 was narrow, short-lived, and did not pit two clients against one another in the same litigation,
21 neutralizing concerns about divided loyalties in the future. The class is also represented by an
22 array of lawyers, further minimizing these concerns. Settling Counsel has also added new
23 attorneys, both from a public interest law firm and a new FCRA firm. This will help protect the
24 class from any residual advocacy concerns the Court can imagine. Taking these facts together,
25 the Court finds that this factor weighs against disqualification.

26 Finally, the Court considers the general policy interest of not undermining the purpose of
27 class actions with disqualification rules designed for more traditional lawsuits. "If, by applying
28 the usual rules on attorney-client relations, class counsel could easily be disqualified in these

1 cases, not only would the objectors enjoy great ‘leverage,’ but many fair and reasonable
2 settlements would be undermined by the need to find substitute counsel after months or even
3 years of fruitful settlement negotiations.” *Lazy Oil*, 166 F.3d at 589; *see Sharp*, 163 Cal. App.
4 4th at 428-34 (“[T]raditional rules of professional conduct cannot be applied mechanically in the
5 realm of class actions.”). The problem this case presents is not new to class action litigation: the
6 conflict rules written for single-client, traditional litigation simply have limited utility under
7 these circumstances. *See Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir.
8 1988) (“[C]onflicts of interest are built into the device of the class action[.]”). The conflict that
9 emerged in this case is a direct result of the unique and evolving nature of complex class action
10 lawsuits. Because of these circumstances, the conflict does not implicate the same degree of
11 concern over loyalty and fairness as would a traditional concurrent conflict, and the end of the
12 settlement ends the conflict. Disqualifying Settling Counsel would deprive the class of valuable
13 experience and skill. Disqualification would also be unduly harsh to Settling Counsel and
14 disproportionate to their actions. Because disqualification would be unfair and bad for the class,
15 this factor weighs against disqualification.

16 After reviewing the record and considering the above factors, the Court declines to
17 exercise its discretion to disqualify Settling Counsel. In light of these considerations, the
18 Motion to Disqualify is DENIED.

19 **III. Motion and Cross-Motion to Appoint Interim Class Counsel**

20 Because the Court declines to disqualify Settling Counsel, it is necessary to evaluate both
21 counsels’ respective motions for appointment as interim class counsel.

22 White Counsel argue that Settling Counsel are inadequate to represent the class because
23 they violated Rule 3-310. The argument proceeds that the violation damaged Settling Counsel’s
24 loyalty and credibility because they willfully drafted a conflicted settlement term, defended that
25 term in litigation, and then “defiantly refused to acknowledge their error.” Motion to Disqualify
26 at 15. White Counsel claim that a “series of irreversible effects” permanently divorce Settling
27 Counsel’s interests from those of the class, including: (1) potential civil liability for breach of
28 the duty of loyalty; (2) potential liability for lost interest to the class during the appeal; (3)

1 forfeiting the right to fees for further work; (4) adverse incentives to enter into a new settlement
2 to avoid the cost of re-noticing the class.

3 Settling Counsel respond that no present conflict exists, and so there is no further ethical
4 concern. Second, they point out that the monetary relief settlement was fully negotiated before
5 the conflicted incentive award provision, and the Ninth Circuit took no issue with that
6 settlement. Settling Counsel further claim full commitment to the lawsuit regardless of the prior
7 settlement, and state outright that they will not apply for fees incurred during the conflicted
8 representation period. *See* HT 48.¹ Settling Counsel have also agreed to cover any cost of re-
9 noticing the class, should such a step become necessary. *See id.* at 180-81. Settling Counsel
10 dismiss the potential for civil liability as a red herring, and point out that their own fee interests
11 are directly tied to the amount of the settlement. Finally, Settling Counsel have since partnered
12 with additional counsel to ensure that there are no doubts about their commitment to obtaining
13 the best results for the class. The new members of the Settling Counsel team are two attorneys
14 from the public interest law firm Public Justice, P.C., and FCRA specialists from Francis &
15 Mailman, P.C.

16 Upon considering the voluminous filings and extensive oral argument on this issue, the
17 Court finds that the conflicted incentive award term does not justify finding class counsel
18 inadequate. While the ethical violation is a serious consideration in determining whether to
19 allow Settling Counsel to remain as class counsel, the Court finds on balance that Settling
20 Counsel is the better team to represent the class under Rule 23(g).

21 a. Legal Standards

22 i. Appointing Interim Counsel

23 Rule 23(g)(3) grants the Court authority to appoint pre-certification “interim” class
24 counsel. *See* Fed R. Civ. P. 23(g)(3). The 2003 Advisory Committee Notes explain that interim
25 counsel should be appointed “if necessary to protect the interests of the putative class,” and may
26 be appropriate in cases of “rivalry or uncertainty.” *Id.*, 2003 Advisory Committee Notes. Any
27

28 ¹ “HT” refers to the Hearing Transcript for the hearing held on August 41, 2013 (Dkt. 936).

1 attorney acting on behalf of the class “must act in the best interests of the class as a whole.” *Id.*
2 Interim counsel can only be appointed if that counsel is adequate under the Rule 23(g)(1) factors
3 and will “fairly and adequately represent the interests of the class” under Rule 23(g)(4). Fed R.
4 Civ. P. 23(g)(2).

5 In deciding whether to appoint class counsel in the case of only one applicant, the Court
6 must determine whether the applicant is “able to provide the representation called for by
7 paragraph (1)(B) in light of the factors identified in paragraph (1)(C).” *Id.* When there are
8 multiple lead counsel applicants that are adequate under Rule 23(g)(1)(A), “the court must
9 appoint the applicant best able to represent the interests of the class.” Fed. R. Civ. P. 23(g)(2).
10 The Advisory Committee Notes elaborate on this process:

11 This decision should also be made using the factors outlined in paragraph (1)(C),
12 but in the multiple applicant situation the court is to go beyond scrutinizing the
13 adequacy of counsel and make a comparison of the strengths of the various
14 applicants. As with the decision whether to appoint the sole applicant for the
15 position, no single factor should be dispositive in selecting class counsel in cases
16 in which there are multiple applicants.

17 *Id.*, 2003 Advisory Committee Notes.

18 ii. Adequacy of Class Counsel

19 In evaluating adequacy under Rule 23(g)(1)(B), the Court looks to the factors identified
20 in paragraph (1)(A): (1) the work counsel has done in identifying or investigating potential
21 claims in the action; (2) counsel’s experience in handling class actions, other complex litigation,
22 and the types of claims asserted in the action; (3) counsel’s knowledge of the applicable law;
23 and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P.
24 23(g)(1)(A). Beyond the four considerations set forth in Rule 23(g)(1)(A), the Court “may
25 consider any other matter pertinent to counsel’s ability to fairly and adequately represent the
26 interests of the class.” Fed. R. Civ. P. 23(g)(1)(B).

27 There is no specific direction in Rule 23 regarding how a court should consider prior
28 ethical conduct in the adequacy analysis. Because the issue does not fit smoothly into any of the

1 four enumerated factors, the Court considers it under the final residual factor, 23(g)(1)(A), as
2 “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of
3 the class.” This is consistent with other district courts considering this issue. *See* Second Decl.
4 of William B. Rubenstein (“Second Rubenstein Decl.”) (Dkt. 903) ¶ 13; *Deangelis v. Corzine*,
5 286 F.R.D. 220, 224 (S.D.N.Y. 2012) (deciding first that all applicant counsel were adequate
6 under Rule 23 before considering and rejecting concerns that one lead counsel firm “may be
7 tainted by conflicts of interest arising out of their prior participation in the Securities Action,
8 because the putative class in that action seeks damages from the same limited pool of resources
9 as the putative class in the Commodities Action”); *In re Air Cargo Shipping Servs. Antitrust*
10 *Litig.*, 240 F.R.D. 56, 58 (E.D.N.Y. 2006) (deciding first that all applicant counsel were
11 “adequate” under the four Rule 23 factors before weighing how one group’s “baggage” of
12 having already entered into settlements with the defendants should affect the selection of interim
13 counsel).

14 This leaves the question of how to decide whether such a violation renders counsel
15 inadequate. Counsel have not identified a specific standard, and so the Court gathers legal
16 guidance from the existing case law. First, it is clear that a lawyer’s unethical conduct, both
17 before and during the litigation in question, is relevant to determining whether counsel is
18 adequate under Rule 23. *See Creative Montessori Learning Centers v. Ashford Gear LLC*, 662
19 F.3d 913, 918 (7th Cir. 2011); *Yumul v. Smart Balance, Inc.*, No. 10-00927, 2010 WL 4352723,
20 at *4 (C.D. Cal. Oct. 8, 2010) (“In determining whether to certify a class in this case, however,
21 unethical conduct by plaintiff’s counsel would be a relevant consideration.”); *Walter v.*
22 *Palisades Collection, LLC*, No. 06-378, 2010 WL 308978, at *10 (E.D. Pa. Jan. 26, 2010)
23 (“Prior unethical conduct is a relevant consideration pursuant to certification under Rule
24 23(a)(4).”); *Bogner v. Masari Investments, LLC*, 257 F.R.D. 529, 533 (D. Ariz. 2009)
25 (examining prior ethical complaints against proposed class counsel in a FDCPA class action).
26 Not every ethical violation, however, produces inadequacy under Rule 23. *See Creative*
27 *Montessori*, 662 F.3d at 917 (finding counsel adequate despite their obtaining materials from a
28 third party “on the basis of a promise of confidentiality that concealed the purpose of obtaining

1 the material, a purpose inconsistent with maintaining confidentiality and likely to destroy [the
2 broadcaster's] business," and sending a misleading letter to class representative).

3 At one extreme, when counsel has an ongoing conflict with a group of plaintiffs after a
4 court rejects a settlement, counsel can no longer continue representing the whole class. In
5 *Piambino*, some members of the plaintiff class were claimants in a separate state-court class
6 action against the same defendant. *Piambino v. Bailey (Piambino I)*, 610 F.2d 1306 (5th Cir.
7 1980). Because the defendant lacked sufficient funds to pay the state court judgment and relief
8 to the rest of the federal class, class counsel took steps to prevent the state plaintiffs from
9 receiving payments. *Id.* at 1314. The *Piambino I* court reversed the injunction preventing
10 payments to state claimants and allowed a Compliance Officer to intervene on behalf of those
11 claimants. *Id.* at 1333. When the case returned to the Eleventh Circuit in *Piambino II*, the court
12 discussed the inherent conflict in class counsel's representing both groups of plaintiffs, and class
13 counsel's misleading and questionable conduct surrounding its representation of the class.
14 *Piambino v. Bailey (Piambino II)*, 757 F.2d 1112, 1143 (11th Cir. 1985). Finding that "any
15 settlement [counsel] might arrange would, indeed, be suspect, even if, in truth, it was 'fair,
16 adequate, and reasonable,'" the court invoked its supervisory power to remove class counsel
17 from the case. *Id.* at 1146.

18 Under less severe circumstances, unethical conduct that does not directly harm the class
19 or create an immediate conflict can also render counsel inadequate. In the Seventh Circuit,
20 "[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class
21 loyally requires denial of class certification." *Creative Montessori*, 662 F.3d at 917-18 (noting
22 that counsel's "lack of integrity . . . casts serious doubt on their trustworthiness" and that there
23 was "no basis for confidence that they would prosecute the case in the interest of the class . . .
24 rather than just in their interest as lawyers") (internal citations omitted). Such a "serious doubt"
25 about the adequacy of counsel exists "when the misconduct jeopardizes the court's ability to
26 reach a just and proper outcome in the case." *Reliable Money Order, Inc. v. McKnight Sales*
27 *Co., Inc.*, 704 F.3d 489, 499 (7th Cir. 2013). Case law preceding this standard suggests that the
28 degree of unethical conduct justifying a finding of inadequacy is high, and often turns on

counsel's integrity and candor. *See Viveros v. VPP Grp., LLC*, No. 12- 129, 2013 WL 3733388, at *11 (W.D. Wis. July 15, 2013) (denying class certification in part because class counsel was previously publicly reprimanded by the Wisconsin Supreme Court for making misrepresentations to the Office of Lawyer Regulation, had improperly solicited a client, and had made improper comments during closing arguments in another case); *Walter*, 2010 WL 308978, at *10 (finding class counsel inadequate due to multiple prior disbarments for issues associated with the application of client funds, multiple sanctions, a "private reprimand" from the state Supreme Court disciplinary board, and a "history of dilatoriness" in the litigation at hand); *Bodner v. Oreck Direct, LLC*, No. 06-4756, 2007 WL 1223777, at *2-3 (N.D. Cal. Apr. 25, 2007) (denying certification where class counsel had a pattern of ethical violations showing that counsel repeatedly developed lawsuits before finding plaintiffs, a "cart before the horse" approach, "never mind the lack of a fitting plaintiff or the lack of ethical scruples"); *Kaplan v. Pomerantz*, 132 F.R.D. 504, 510-11 (N.D. Ill. 1990) (granting motion for decertification in part because "plaintiff's counsel was at least a silent accomplice in, and at most encouraged," plaintiff's false deposition testimony); *Wagner v. Lehman Brothers Kuhn Loeb Inc.*, 646 F. Supp. 643, 659, 661-62 (N.D. Ill.1986) (denying class certification in part because class counsel offered to pay a witness for his testimony).

b. Discussion

i. Adequacy

1. Work Counsel Has Done in Identifying or Investigating Potential Claims in the Action

The Court finds that both counsel have worked extensively on this matter. Settling Counsel have been on the scene since the beginning, and have assumed the lead counsel role. The White Counsel team includes attorneys Wolf and Juntikka, both of whom were involved in the litigation from its earliest stages. Boies Schiller joined the action in March 2009 and has been an active presence since. *See Motion to Appoint Interim Counsel* at 8. Consideration of the whole record shows that both groups have participated significantly in the legal work of this case. Although both counsel do much hand-wringing and pearl-clutching over the various tasks

1 undertaken, or not, by each respective team, the Court finds these protestations trivial. Each
2 team has performed sufficient work for this factor to weigh in favor of adequacy for both.

3 2. Counsel's Experience in Handling Class Actions, other Complex
4 Litigation, and the Types of Claims Asserted in the Action

5 The Court similarly finds that both teams present sufficient experience to satisfy the
6 adequacy inquiry. Settling Counsel's record on this front is more impressive, as the legal team
7 boasts extensive experience in class action lawsuits generally and FCRA particularly, with
8 FCRA-dedicated lawyers from Francis & Mailman and class-action focused attorneys from
9 Leiff Cabraser and Caddell & Chapman. White Counsel have notably less class action and
10 specialized FCRA experience, and none of the attorneys have served as lead class counsel. *See*
11 HT 138. However, attorneys from Boies Schiller bring strong experience in general complex
12 litigation. *See* Motion to Appoint Interim Counsel at 4-5; Decl. of George F. Carpinello (Dkt.
13 902) ¶ 6. Boies Schiller also represents that further resources and personnel at the firm are
14 available, should they be needed. HT 139-40; Motion to Appoint Interim Counsel at 11. Given
15 the experience of White Counsel in complex litigation matters generally, and in this lawsuit up
16 to this point, the Court does not find that its less compelling credentials tip the scales against
17 adequacy on this basis. The Court thus finds that this factor weighs in favor of adequacy for
18 both counsel.

19 3. Counsel's Knowledge of the Applicable Law

20 In this arena, again, Settling Counsel's credentials are superior. The FCRA, particularly
21 in the class action context, is a complex and challenging area of law. Settling Counsel's team
22 includes a deeper bench on FCRA litigation, while the White Counsel team does not include a
23 specific, experienced FCRA attorney. However, White Counsel can count bankruptcy expertise
24 on their side, and long-running involvement with the current litigation. Requiring that every
25 FCRA litigation team include a preordained expert would be absurd. Nevertheless, the FCRA
26 issues presented here are compounded by the size of the class and the complexity of the
27 questions, making FCRA expertise even more valuable. Still, White Counsel are experienced in
28 complex litigation and have participated in this case up to this point. The Court has no reason to

doubt these lawyers' abilities to handle the doctrinal complexities they face, and to associate additional counsel if necessary. The Court thus finds that this factor weighs in favor of adequacy for both counsel.

4. The Resources that Counsel Will Commit to Representing the Class

Both counsel have committed significant resources to this litigation. Again, the Court acknowledges that each set of lawyers has a different opinion of the opposing counsel's commitment, work product, and approach. Despite these near-fanatic beliefs, however, the Court finds that both sides have proved themselves ready and willing to commit the appropriate degree of attention and resources to this litigation. The Court finds that this factor also weighs in favor of adequacy for both parties.

On these factors, the Court concludes that both counsel are adequate to represent the class. *See also* Second Rubenstein Decl. ¶ 3.

5. Residual Considerations Under Rule 23(g)(1)(B)

Where all the other factors weigh in favor of finding both parties adequate, the Court now turns to whether there are any considerations that might call into question either side's ability to fairly and adequately represent the class. The only such factor of which the Court is aware is Settling Counsel's prior ethical violation caused by the improper incentive award structure. With the standards described above in mind, the Court concludes that the conflict does not render Settling Counsel inadequate under Rule 23(g).

First, the Court notes that the question is not whether a present conflict exists between Settling Counsel and the absent class. As discussed previously, the Court finds that no conflict existed after the Ninth Circuit rejected the settlement. *See Rodriguez II*, 688 F.3d at 652. This is not a case like *Piambino*, in which the conflicts that destroyed the first settlement could not be rectified. *See Piambino II*, 757 F.2d at 1143. Instead, the Court must now determine the after-effects of an ethical violation whose immediate taint has been cured. This is more similar to the unethical conduct that does not directly harm the class or create an immediate conflict that the Seventh Circuit contemplated in *Creative Montessori*, 662 F.3d at 917.

1 The Court finds that this is not a situation in which greedy counsel have sold out their
2 plaintiffs for their own benefit. Concerns about such unscrupulous and distasteful tactics are
3 well-founded, and the Court has carefully reviewed this record for any evidence of malfeasance.
4 Ultimately, the Court finds that Settling Counsel has generally been attentive, diligent, and
5 vigorous in their representation. The conflict did not become an issue until the eve of
6 settlement, before which counsel had helped negotiate far-reaching and badly needed injunctive
7 relief that will benefit all consumers going forward. Counsel also negotiated a very high
8 settlement in the face of a tentative order denying certification. Ultimately, the Court can find
9 no bad faith in Settling Counsel's actions.

10 The Court also finds nothing insidious in Settling Counsel's failure to call the conflict to
11 the attention of the Court, or their insistence on defending the provision in further litigation.
12 First, the incentive provision was part of the preliminary settlement papers presented to the
13 Court, not a hidden agreement entered into privately or later exposed at certification, as in
14 *Rodriguez*. See *Rodriguez I*, 563 F.3d at 959. Second, the Court can see nothing insidious in
15 Settling Counsel's defense of the provision. The Court finds Settling Counsel credible in their
16 representations that they believed the incentive award was appropriate and non-conflicted. See
17 HT 49-50. The fact that they were wrong on the law does not make them liars. Indeed, the
18 Court agreed with Settling Counsel and approved the settlement. The Court thus shares the
19 burden of fault for not recognizing the implications of the incentive provision.

20 The Court is more concerned about the apparent breakdown of communication between
21 Settling Counsel and the White Plaintiffs. See First Rubenstein Decl. ¶¶ 32-33. Communicating
22 in a timely way with class representatives is a crucial part of lead counsel's responsibilities, and
23 it seems that Settling Counsel faltered on this front. The Court does not find that this raises
24 "serious doubts" about Counsel's integrity or loyalty, but it does suggest Settling Counsel's
25 efforts to manage the litigation fell short.

26 Concerns about adverse incentives, including possible civil liability or costs of re-
27 noticing the class, are better taken. Indeed, the *Piambino II* court considered the financial
28 liability of counsel too strong an incentive to settle. In that case, however, counsel had already

1 spent the \$800,000 in attorneys' fees that the court demanded returned after removing counsel
2 from the lawsuit. *Piambino II*, 757 F.2d at 1146 ("Whatever course Lead Counsel choose to
3 follow in an effort to extricate themselves from their present dilemma, one thing is clear: if
4 allowed to remain in this case, they would have a compelling interest in negotiating a settlement
5 that covers their losses."). The immediacy of that threat is far different than the amorphous
6 potential for civil liability in this case. The possibility of civil liability by a class cannot be
7 sufficient on its own to render counsel inadequate if there is to be any leeway granted for
8 misconduct in the adequacy realm. As previously discussed, misconduct within the course of a
9 class action case is not a per se bar to adequacy, although nearly all misconduct likely could give
10 rise to some form of civil liability.

11 The Court also finds the association of further counsel, particularly a public interest law
12 firm associated with a nonprofit, relevant to this question. Settling Counsel added their new
13 partners with a specific eye to neutralizing any improper incentives for renewing the old
14 settlement, or any attachment thereto. Counsel in fact hired an expert specifically to help draft
15 the association agreements to speak to this issue. *See* First Decl. of Charles Silver ("First Silver
16 Decl.") (Dkt. 891) ¶¶ 6, 8-11; Second Decl. of Charles Silver ("Second Silver Decl.") (Dkt. 911)
17 ¶¶ 26-31. The Court also agrees that the addition of new counsel shores up any risk of adverse
18 incentives on the Settling Counsel team. The Court disagrees with White Counsel's argument
19 that previous donations by Settling Counsel to Public Justice's foundation or to the NCLC
20 render the partnership suspect. The record does not suggest to the Court that an improper
21 relationship has ever existed, nor that Public Justice and NCLC offer their services as a way to
22 garner donations in the future. *See* HT 122-27. The overall budgets of these organizations
23 suggest that donations from the law firms in this case are valuable but not indispensable. *See id.*
24 at 132.

25 The Court finds no basis on which to seriously doubt Settling Counsel's integrity or
26 loyalty to the class. Because courts considering these issues consistently focus on counsel's
27 motivations, integrity, and credibility, and keep vigilant watch for any bad faith desire to cash in
28 at the expense of the class, the Court primarily bases its finding on this ground. The record

1 simply does not demonstrate any nefarious, manipulative, or self-serving calculation behind
2 Settling Counsel's actions. The factual record herein and the Court's own experience with this
3 legal team shows a professional, capable, and committed set of attorneys.

4 The Court does not intend to minimize the importance of conflicts in the class conflict
5 generally, nor to reduce the importance of searching inquiry. Where the conflict was brief and
6 pointed, however, and not inherent to the nature of the suit, there is room to look back to
7 counsel's motivations, behavior, and integrity to determine their role going forward. Where the
8 record bears out an unfortunate and significant legal miscalculation rather than a sneaky power
9 play, the Court sees no reason to question counsel's loyalty.

10 The Court thus finds Settling Counsel adequate to represent the class under Rule 23(g).

11 ii. Choosing Between Adequate Applicants

12 Because both applicants are adequate, the Court turns to the issue of which counsel is
13 "best able to represent the interests of the class." Fed R. Civ. P. 23(g)(2). As directed in the
14 Advisory Committee Notes, the Court revisits the Rule 23 adequacy factors to determine which
15 counsel group should represent the class going forward. Regarding the amount of work and
16 resources committed thus far, the Court finds no difference between the two groups that justifies
17 preferring one over the other. Similarly, the Court finds that the willingness of both teams to
18 commit resources in the future is equally matched.

19 Regarding the experience of the respective teams and their expertise in the relevant area,
20 however, Settling Counsel have a distinct advantage. As discussed, Settling Counsel's
21 credentials and experience are significantly stronger in class action and FCRA litigation.
22 Indeed, it is these credentials that likely drew Mr. Juntikka and Mr. Wolf to request Leiff
23 Cabraser's help in the first place. The team is also more varied and appears to work well
24 together. Settling Counsel's work on this case up to this point has been excellent. First, Settling
25 Counsel negotiated far-reaching and incredibly valuable injunctive relief on behalf of this class.
26 That settlement was two-fold, requiring both retrospective and prospective relief. The
27 agreement required fixing errors on existing credit reports and changing credit reporting
28 agencies' methods of tracking and reporting consumer credit information. This was a significant

1 benefit not only to the class, but to the public at large. Settling Counsel played an important role
2 in orchestrating this relief.

3 Second, the incentive provision does not destroy the value of the underlying settlement.
4 Settling Counsel helped negotiate a very valuable and comprehensive monetary settlement, the
5 terms of which were arranged before Settling Counsel added the incentive provision. Although
6 White Counsel strenuously emphasize that the settlement abandoned class members for pennies
7 on the dollar, the Court views this as a short-sighted position. The settlement provided \$45
8 million for the class, one of the highest FCRA settlements in history. The agreement rewarded
9 plaintiffs with proof of harm with monetary awards commensurate to their losses. Plaintiffs
10 with proof would receive anywhere from \$150 to \$750, depending on the type of loan they lost.
11 This is well within the range of these parties' statutory damages, which would range between
12 \$100 and \$1,000, and appropriately scaled awards to the harm experienced. The settlement
13 further provided a "convenience award" of about \$25 to members of the class *who could show*
14 *no proof of any injury*. Settling Counsel was able to obtain such an agreement while the Court's
15 tentative order denying certification stared the parties in the face, which is further evidence of
16 their skill and commitment to the class.

17 In tandem with the Court's review of Settling Counsel's work in the case up to this point,
18 the Court considers the problems created by the incentive provision. The Court agrees with
19 White Counsel that the ethical violation must be relevant to this discussion. *See* Second
20 Rubenstein Decl. ¶¶ 23-25. Finding counsel adequate does not render the violation irrelevant;
21 determining which counsel is *better* for a job is not the same as deciding whether each is
22 *capable*. *See Deangelis*, 286 F.R.D. at 224; *In re Air Cargo*, 240 F.R.D. at 58. The Court
23 therefore considers the ethical violation an important part of this analysis. Settling Counsel
24 made a significant legal miscalculation and a costly mistake when they included the incentive
25 provision.

26 But, the Court does not believe that the taint of the incentive provisions should hover,
27 Pigpen-like, around Settling Counsel forevermore. The Court finds no bad faith or improper
28 motives behind the incentive provision, and does not find any basis to question Settling

1 Counsel's integrity. The conflict itself did not affect the terms of the settlement, which were
2 very favorable and carefully calibrated to account for varying degrees of harm within the
3 plaintiff class. Settling Counsel has also taken extraordinary steps to neutralize the effect of the
4 ethical violation, including associating new counsel, disclaiming any fees for the conflicted
5 representation, and agreeing to accept the costs of re-notice. Thus, while the Court carefully
6 considers the impact of the ethical violation, the Court does not find this to be indicative of any
7 underlying incompetence or dishonesty on Settling Counsel's part.

8 With these considerations in mind, the Court turns to evaluating White Counsel.
9 Regarding skill and experience, White Counsel lack the same depth of class action and FCRA
10 experience. Generally, the Court would not be reticent to give skilled litigation generalists
11 control of a class action despite a relative lack of specialized experience. The Court hesitates in
12 this case because of its complexity and extensive history. Although Boies Schiller carries an
13 impressive reputation, none of the attorneys on record here has ever served as lead counsel for a
14 class action; their class action experience overall is very limited. Generalized promises of
15 additional resources and personnel are valuable, but the promised expertise is not yet evident.
16 The White Counsel team also does not appear to have made significant efforts to add on
17 additional counsel who might help fill gaps in the team's current experience.

18 White Counsel also have less accumulated experience with this particular case. Although
19 Mr. Juntikka and Mr. Wolf have participated in this case from the beginning and participated in
20 the injunctive relief negotiations, they represent a small part of the overall legal team up to this
21 point. Boies Schiller is a relatively recent addition, with most of its work focused on the post-
22 settlement phase. *See* Orders Admitting George Carpinello and Adam Shaw *pro hac vice*, May
23 8, 2009 (Dkt. 425, 426). These aspects of White Counsel's experience put them at a
24 disadvantage compared to Settling Counsel.

25 The Court also carefully considers White Counsel's valuation of this case as a statutory
26 damages case. The Court articulated numerous concerns with this theory and with the overall
27 theory of class certification in its 2009 tentative order denying certification. *See* Tentative
28 Order. Specifically, the Court found that the typicality and commonality requirements could not

1 be met when some class plaintiffs had benefited from Defendants' past reporting practices,
2 while others were harmed. *See id.* at 7-8. These same concerns, along with the constitutional
3 concerns of awarding statutory damages to individuals who suffered no harm, informed the
4 Court's finding that the class did not satisfy Rule 23(b). *See id.* at 10. White Counsel seek to
5 risk the substantial awards allotted to class members with actual proof in favor of those with no
6 proof whatsoever, also while risking the commonality and typicality issues the Court raised in
7 its tentative.

8 Despite these concerns, and the Court's tentative decision denying certification, White
9 Counsel seem unwilling to entertain any alternative. Arguments on this matter do not encourage
10 the Court that White Counsel have considered the Court's concerns or are willing to investigate
11 all avenues to serve the class's best interests. *See* HT 31. White Counsel expressed
12 disagreement about the value of the prior settlement and Settling Counsel's concerns regarding
13 individual harm because "[t]his is a statutory damages case. And no plaintiff -- no plaintiff has
14 to show that they suffered harm, quote/unquote, as a result of a violation of a credit report that
15 was issued in error." *Id.* The Court is perfectly willing to acknowledge its own legal error if the
16 tentative order's analysis proves inaccurate. The Court further takes no position on the proper
17 outcome of this case. Rather, the Court's experience with White Counsel worries the Court that
18 the legal team has a fixed idea of its legal theory, is unwilling to reconsider that idea, and
19 unwilling to even address the Court's concerns. This calls into question counsel's ability to
20 reasonably evaluate all of the class's options.

21 The Court has considered the facts and the entirety of the record in this case, and this
22 Court's history with both counsel in this matter. The Court has also considered appointing
23 independent and entirely unrelated counsel going forward. This would arguably be the best
24 outcome for the class, because there are serious questions about both counsel groups working
25 effectively and professionally together after the rancor seen on this matter. Appointing entirely
26 new counsel would erase any concern about bias on either side, lifting the weight of past
27 relationships or attachments. Appointing new counsel is simply not feasible, however. The
28 time required to locate new counsel and fully educate them on the issues and legal matters of

1 this case would be significant. The Court also considers it especially unfair and burdensome to
2 appoint new counsel to a complex and unwieldy case when the Court has already issued a
3 tentative order denying certification.

4 Taking all of these considerations into account, the Court finds that Settling Counsel is
5 the better team to represent the class going forward. The Court finds that Settling Counsel's
6 experience, diligence, and good faith effort up to this point show they will continue to
7 vigorously represent the class. Were an equivalently experienced, capable, and reasonable team
8 available on the other side of the ledger, the Court would choose that team. White Counsel
9 cannot provide that option at this time. Although White Counsel has a team of able and
10 committed lawyers who are no doubt skillful in their practice areas, they lack the same
11 specialized experience and depth of ability. The Court is also deeply concerned that White
12 Counsel are unable to see past their attachment to statutory damages and explore other options,
13 given their unwillingness to acknowledge the Court's concerns about the divergent injury and
14 damages within the plaintiff class.

15 White Counsel point out that re-appointing former lead counsel after an ethical violation
16 may be unprecedented. *See* Second Rubenstein Decl. ¶ 26. The Court does not disagree. The
17 particular factual circumstances of this case, however, do not appear to have any true parallel in
18 the case law. Counsel did not lie to the Court or their clients, did not work under a conflict with
19 clients in a different litigation, and did not work against existing clients. The particular
20 circumstances of this conflict are unique, and simply do not carry the same disparaging
21 connotation as the situations faced by other courts. The Court thus returns to its obligation to
22 "appoint the applicant best able to represent the interests of the class," Fed. R. Civ. P. 23(g)(2),
23 and finds that this applicant is Settling Counsel's legal team.

24 The Court thus DENIES White Counsel's motion for appointment of interim counsel and
25 GRANTS Settling Counsel's cross-motion for appointment of interim counsel.

26 **IV. Disposition**

27 For the reasons stated herein, the Court rules as follows:

- 28 • White Counsel's Motion to Disqualify is DENIED;

- White Counsel's Motion to Appoint Interim Class Counsel is DENIED; and
- Settling Counsel's Cross-Motion to Appoint Interim Class Counsel is GRANTED and the Settling Counsel team is APPOINTED interim class counsel under Rule 23(g)(3).

DATED: January 21, 2014



DAVID O. CARTER
UNITED STATES DISTRICT JUDGE