

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**In re LITERARY WORKS IN  
ELECTRONIC DATABASES  
COPYRIGHT LITIGATION**

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**Master Docket No. M-21-90 (GBD)  
(MDL # 1379)**

**MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE PRELIMINARY APPROVAL AND MOTION TO  
ESTABLISH NEW PROCEDURES FOR FINAL APPROVAL AND AWARD OF  
ATTORNEYS' FEES**

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**I. Introduction.**

This motion is brought by a class member, Irvin Muchnick (hereafter “Muchnick”). Muchnick is a long time advocate on behalf of freelance writers. (Declaration of Irvin Muchnick (hereafter Muchnick Decl.), ¶ 4 -10, 14, 16.) He was instrumental in the pursuit of probably the only previous class action raising claims of copyright infringement by freelance writers, the UnCover case. (Muchnick Decl., ¶ 7.) That case, against a single infringer which provided articles from prior publications by facsimile, obtained class certification prior to, and independent of a settlement. (*Id.*) It resulted in a settlement of \$7,250,000. (*Id.*) Muchnick was also involved, as a consultant to one plaintiffs’ law firm, in the initiation of one of the present actions. (*Id.*) Muchnick has a single Category A, or B, claim (depending on whether one uses the definition of the Settlement Agreement or the Notice) and several Category C claims.

With the exception of the points made below about deficiencies with the Notice, including the meaning of the term “literary,” and the argument that the Notice is misleading because of this issue, together with the improper requirement that class members must appear in New York at the fairness hearing in order to object to the settlement, this motion is not an objection to the settlement. It is an objection that preliminary approval was improvidently granted because the attention of the Court was not directed to deficiencies in the application for preliminary approval, or to important questions which exist about the settlement. In addition, it is a request that when this matter proceeds toward a Rule 23 fairness hearing the procedures require the parties to supply substantially more information so that it is available to class members who wish to consider opting out, or objecting. This motion argues that by proceeding under the present preliminary approval, and with no more information made

easily available to class members before the deadline to opt out or object, the class will be denied due process.

Because this is not an objection to the settlement, with the exceptions noted, Muchnick is not presenting the kind of legal argument that would be appropriate to an effort to convince the Court to reject the settlement. That will come in connection with objections, to the extent they are appropriate. The legal authority below is only to demonstrate that a significant issue is presented.

**II. The Application For Preliminary Approval Was Inadequate and Did Not Serve The Interests of the Class.**

There were only several days between the application for preliminary approval and the order of approval. This virtually eliminated the possibility of an interested class member considering the proposed settlement, and Notice, and raising questions. There are questions to be asked. Class counsel properly relied upon the Manual for Complex Litigation in describing the preliminary approval procedure. However, there are recommendations in the Manual which they did not implement.

The Manual suggests that when the class is being certified for settlement only “it is often prudent to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who represent individual class members but did not participate in the settlement negotiations.” Manual for Complex Litigation, Fourth (1<sup>st</sup> ed. 2004)(hereafter “Manual”), § 21.632. This is particularly appropriate since when a settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

The application was improper because:

1. It did not provide the Court with the damages information necessary for the Court to determine, even preliminarily, that the settlement falls within “the range of reasonableness.”

2. It did not bring to the Court’s attention that one group of the class, holders of Category C claims, faces the distinct possibility of receiving nothing for those claims while the holders of Category A and B claims would be unaffected. This arises if the total claims exceed the net settlement fund available to the class. This situation presents the need to seriously consider subclasses, or some other mechanism to protect the interests of Category C class members.

3. It did not consider other questions, raised below, which appear to deserve attention at this early point in the approval process. The questions may not have occurred to Class Counsel, so no suggestion that they intentionally misled the Court is intended. After years of work, and with some reward for their efforts at hand, their close attention to the class’ interests might understandably be weakened. That is one of the reasons for Court approval of such settlements.

**III. The Notice Is Constitutionally Deficient, Uses a Particular Confusing Settlement Term, Misuses Settlement Agreement Terms and Fails To Comply With a Recent Amendment to Rule 23 Regarding Awards of Attorneys’ Fees.**

**A. Requiring A Class Member Wishing To Object To Appear in New York Is a Violation of Class Members’ Right to Due Process.**

The forms of Notice approved with the preliminary approval require that a class member must appear at the fairness hearing in person, or by counsel, in order to present any objection to this settlement. This provision is plainly unconstitutional. It is also virtually



unheard of in this counsel's experience and extensive review of reported and unreported class actions. The class is not just national, but international in scope. Some recoveries provided by the settlement are as low as \$5 to \$60 dollars, and these recoveries in Category C are subject to forfeiture. (See, *infra* at p. 9.) To require that a class member come from out of New York, not to mention from California, or India, in order to state an objection, simply defies comprehension. This provision is so stunning in the burden that it places on objecting that it raises the suspicion that the parties are attempting to limit or suppress objection.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972) . . . [further citations omitted] .... These essential constitutional promises may not be eroded.

*Hamdi v. Rumsfeld*, --- U.S. ---; 124 S. Ct. 2633, 2648-2649; 159 L. Ed. 2d 578 (2004).

The right of a class member to object is part of the constitutional right of procedural due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). [P]rocess which is a mere gesture is not due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). Movant could belabor the Court with citation to extensive discussion about the analysis of burdens on constitutional rights, but there simply is no reason to do so here. This burden clearly exceeds anything reasonable, and there is no possible justification for it.

Counsel for movant believes the virtually uniform procedure of federal courts is for notices to provide for written objections to be filed with the court, and those class members wishing to appear at the fairness hearing to file a notice of intention to appear. This is this practice illustrated in the three forms of notice recommended by the Federal Judicial Center. (see, <http://www.fjc.gov/>, then click on "Class Action Notices Page.")

**B. The Use of the Term “Literary” In The Settlement Agreement, Notice and Claim Form Is Confusing and Misleading.**

The definition of the class refers to owners of the copyright in “an English language literary work.” (Settlement Agreement, § 1.f., page 4.) The Settlement Agreement does not define “literary.” However, the Copyright Act defines the term.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied. 17 U.S.C. § 101.

The other kinds of works protected under the Copyright Act are “architectural work,” “audiovisual works,” “computer program,” “motion pictures,” “pictorial, graphic, and sculptural works,” “sound recordings,” and “work of visual art.” *Id.*

The use of “literary” in the Settlement Agreement, and related settlement documents, has the potential to confuse class members since it implies some quality of being “literature”<sup>1</sup> as opposed to anything written with words, numbers, symbols or indicia. It clearly appears that it has confused the parties.

The Notice of Class Action Settlement states that certain works are excluded, including “scientific studies” and “content other than literary works.”<sup>2</sup> (Notice, § 3.B.1., page 3; Ex. A to Declaration of A.J. De Bartolomeo.) Scientific studies are written with words, numbers and symbols, and are therefore literary works as defined by the Copyright Act.

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<sup>1</sup> One dictionary defines “literature” as: 1. Imaginative or creative writing. 2. The body of written works of a particular language, period or culture. 3. Printed material of any kind, as for a political campaign. The American Heritage Dictionary, Fourth Ed.

<sup>2</sup> The Order For Preliminary Settlement Approval states that amended forms of Notice were handed to the Court on March 31, 2005. Movant does not have these, as they were apparently not filed, at least as of when Movant obtained copies of pleadings from the Court file. If the “literary” issue was corrected by those amended forms this point can be disregarded.

Further, that exclusion adds to the impression that “literary” means literature in the creative writing sense. The phrase “content other than literary works” compounds the problem, because we do not know what literary means in this phrase. The problem gets worse with the Claim Form. It instructs that “articles in scientific or academic journals are not considered Subject Works, and you should not complete Worksheets for them.” (Claim Form, § B., page 2, Ex. A to Declaration of A.. J. De Bartolomeo.) Such articles are clearly literary works under the Copyright Act, and there is nothing in the settlement agreement to indicate that the Copyright act definition should not govern. Therefore, there needs to be some explanation of why scientific or academic articles, which are nowhere mentioned in the Settlement Agreement, are not Subject Works under the Settlement Agreement.

**C. The Notice Deviates From the Settlement Regarding the Award Categories and Creates Prejudicial Confusion.**

The Settlement Agreement defines a Category A award as available if a class member “registered [their work] ... in time to be eligible for statutory damages under 17 U.S.C. § 412 (2)” (Settlement Agreement, § 4.a., page 14.) As pertinent here, that means in essence the registration must have an effective date before an infringement (including a series of infringements by the same infringer) started. For example, under that definition it appears that Muchnick has a Category A claim for an infringement, by a company called LookSmart, which commenced sometime around late 2003 or early 2004. (Muchnick Decl. ¶¶ 12, 13.) The effective date of Muchnick’s single registration is October 28, 1999.

However, the Notice contains a differently phrased definition of Category A, which has a much different meaning. It says Category A covers works “registered ... (a) before **any** infringement after the Subject Work was first published, ...” (Notice of Class Action

Settlement, § II.A.1., page 7, Exhibit A to Declaration of A. J. De Bartolomeo.) (emphasis added). The “**any**” means that if infringement by any infringer started before your registration you are limited to either a B or C category claim, even though under the Copyright Act, and under the Settlement Agreement, you would have the right to claim statutory damages and attorneys fees from an infringement that commenced after your registration. The amounts provided under the three categories are such that only Category A can possibly be taking into account the availability of a claimant’s right to recovery statutory damages and attorneys’ fees.

There is an almost identical issue with the respective definitions of Category B.

**D. The Notice Does Not Properly Advise The Class About Class Counsel Filing a Motion For Award of Attorneys’ Fees and Costs.**

A 2003 amendment to Rule 23 requires that Class Counsel seek an award of attorneys’ fees by motion which is directed to the class members in a reasonable manner. Fed.R.Civ.P. 23(h). The Notice must advise the class about this motion. The Advisory Committee recommends that the motion be filed sufficiently before objections are due so that class members can review it. See, *infra*, at p.18.

**IV. There Is No Showing That The Settlement Is Fair, Adequate or Reasonable.**

Plaintiffs correctly told the Court that the settlement must fall within the range of possible approval. However, they presented no information from which one can judge that an \$18 million settlement falls with the range of recovery for this case. Moreover, since the settlement breaks recovery into three distinct groups, with different factual situations and recoveries, there should be a showing of the range of recovery for each group. This presentation must be made to obtain preliminary approval. It should be available to the class

before the deadline for objecting or opting out, not after. It is information that class members should receive before having to make those decisions.

In determining that a settlement is fair, adequate and reasonable the Court must evaluate the eight *Grinnell* factors. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005). Factors eight and nine are: (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id.* Class Counsel state that they have thoroughly investigated the facts and law, that they have a damages report from a economist expert, and that they have a copyright expert who has consulted on “cutting edge copyright issues.” (Memorandum of Law In Support etc., page 12.) However, very little of this has been shared with the Court, and consequently the class, in seeking preliminary approval. What is “the best possible recovery”? What is the possible recovery in light of the attendant risks? What are the risks – in other words, what factual or legal issues have plaintiffs’ counsel evaluated in reaching their opinion that \$18 million is fair?

To be sure, “a high degree of precision can not be expected in valuing a litigation ....” *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2002). But, the *high, low, medium and zero* methodology suggested by Judge Posner in *Reynolds* is a workable approach. *Id.* It is not appropriate to make the decision for preliminary approval solely on the basis of Counsel’s opinion.<sup>3</sup> *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1150-51 (11<sup>th</sup>

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<sup>3</sup> We do not dispute the proposition that Counsel’s opinion is a factor entitled to substantial weight.

Cir. 1983). The remarks of one distinguished district court judge considering a preliminary approval apply here with equal force.

Class counsel has failed to demonstrate why the proposed settlement is fair, adequate, and reasonable. Plaintiffs simply have not given us sufficient information to enable us to make a reasonable assessment of the damages to the plaintiffs, the evidence supporting and rebutting plaintiffs' claims, or the percentage of actual damages each class member would recover if the settlement were approved. ... Plaintiffs state that they have conducted extensive discovery and engaged in "lengthy and hard-fought" negotiations to arrive at this "excellent" settlement, ... but these are simply conclusions. We have been given no information (except conclusory statements) about the extent of discovery, what it has disclosed as to the likelihood of recovery, or what defenses there might be.

*Sutton v. Bernard*, 2002 U.S. Dist. LEXIS 14357, \*5-\*6 (N.D. Ill. 2002).

This is a copyright case where infringement can hardly be disputed. Some class members are undoubtedly entitled to statutory damages and attorneys' fees. If any infringement has taken place since the holding in *Tasini*, as appears to be a virtual certainty, there is an issue of willfulness, to be considered in connection with statutory damages. The infringement has been conducted by for-profit defendant corporations. The infringements covered by this action go back to 1997, and can be shown to continue to the present.

(Muchnick Decl. ¶ 12, 16 – 19.) Why is \$18 million a fair settlement?

**V. Category C Claims Are Treated Prejudicially - Their Awards Alone Can Be Reduced - To Zero.**

Class counsel properly told the Court, citing the Manual for Complex Litigation, that the settlement should be examined for “unduly preferential treatment” for a segment of the class. They asserted that the settlement “did not improperly grant preferential treatment ... to any segments of the class.” (Memorandum of Law in Support etc., page 13.) The trouble is

that there is a preferential treatment, one which could completely eliminate compensation to one segment of the class. But Class Counsel did not explain it to the Court, much less show why it is not improper.

The settlement creates the possibility that class members who own the copyright in Category C Subject Works will not receive any compensation for infringement of those works. However, they will completely release the extensive list of publishers and database operators for that infringement and they will also grant rights to future use of the Category C works.

The complicated Plan of Allocation provides for the possibility that there will be no compensation for Category C claims. (Settlement Agreement, § 4. f.; page 15.) This results from the following language:

[I]f the claims for all Subject Works that were first published after 1977 and that were reproduced, distributed, displayed or transmitted by a Database Defendant (“Post 1977 Claims”), together with all fees and costs, exceed \$18 million, then (i) beginning with Category C claims, and then only if necessary, the Category B and Category A claims will be reduced pro rata by the remaining amount the total Post 1977 Claims exceeds \$18 million as compared to the total amount of Post 1977 Claims for that Category;

One million of the \$18 million is in the form of notice costs by the defendants. Settlement administration costs are capped at \$800,000. Plaintiffs’ counsel have requested approximately \$4.4 million in fees and costs. That is \$6.2 million to be deducted from the total of \$18 million. Therefore if the total of Post 1977 Claims exceeds \$11.8 million the provision comes into effect, and the compensation to Category C Claims, already by far the lowest under the settlement, starts to be reduced in order to bring the total under \$18 million.

Even if this were a remote possibility it would not be proper. But, there are reasons to believe it is not remote. A published article discussing the settlement, and quoting from

statements by a lead plaintiff, recently stated: “For the most prolific writers, individual payouts could top out above \$100,000.” (Muchnick Decl., Ex. J.) The statement is not attributed to the lead plaintiff, so the basis of the statement is not clear. But the logic is clear. Category A owners get \$1500 per work for the first 15 works written for a single publisher, and \$1200 for the next fifteen. That a prolific writer, who has regularly copyrighted their work, and has been working for twenty or more years, totals claims in excess of \$100,000 is possible. One hundred and twenty such prolific writers amounts to more than \$12 million in claims.

There is another provision which is preferential to Category A. Section 4.d. provides for reduced payments for Category B and C when the claim is based on works over a certain age. The justification for this disparate treatment of a class segment needs to be explained. Disparate treatment of a class segment may necessitate the establishment of subclasses. Manual, § 21.632. The subject of subclasses is complex<sup>4</sup>, and Movant is not yet asserting that they are required, though it certainly looks like some protective measures are appropriate when one segment is faced with receiving no compensation but releasing all claims and authorizing continued reuse of their works without further compensation.

It is troubling that Class Counsel did not see the implications of this settlement structure. Courts have shown great concern with any settlement that results in a class, or subclass, receiving no compensation in a settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *Molski v. Gleich*, 318 F.3d 937, 953-954 (9th Cir. 2003).

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<sup>4</sup> See discussion in *In re Simon II Litig.*, 211 F.R.D. 86, 181-182 (E.D.N.Y. 2002)



**VI. Other Serious Questions Exist.**

**A. The Single Infringement Theory of the Settlement Raises Fairness Issues.**

The factual setting of this action is that publishers improperly transferred articles (“works”) for which they did not own the copyright to one or more databases, which was an act of infringement by the publisher and by the database operator. This was the determination of *Tasini*.

Thereafter, some of the works were transferred to other databases which were operated in at least some instances by a different defendant than the first database operator and therefore a different infringer. In some cases they were distributed by that second infringer multiple times. Some of the articles were placed in additional databases, either by the publisher or the first database operator or by the second database operator, and this additional database in some instances was operated by a different defendant. Then there were some distributions from these secondary databases.

Multiple infringements of the same work by the same infringer are treated as one infringement for the award of statutory damages. *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 191-193 (1st Cir. 2004). Two infringements, or series of infringements, of the same work by two different infringers entitles the owner to two statutory damage awards. *Id.* Here there may be several separate infringements of each Subject Work by different defendants. However, each Subject Work receives only a single award in this settlement, without regard to the number of separate infringers. This raises a question about fairness in the allocation. It does not seem fair for the copyright owner whose article was infringed solely by being placed in the database, without any subsequent distribution, to be paid the same as an owner whose article underwent many subsequent infringements due to further

distribution, in the process earning the database operator (and possibly the original publisher under a royalty type agreement) more money.

Statutory damages, absent a showing of willfulness, are between \$750 and \$30,000. 17 U.S.C. § 504(c)(1). A number of factors can be considered in setting the amount. The number of separate infringements by the same infringer is a factor to be taken into account by a court in determining the amount of statutory damages to be awarded. *Venegas-Hernandez*, at 194. Therefore, even the number of infringements by a single infringer is relevant to the damages a copyright owner can recover.

Where willfulness is shown the statutory damages can be increased to \$150,000. 17 U.S.C. § 504(c)(2). The single awards for each Subject Work indicate that willfulness has not been taken into account. However, given the *Tasini* decision, which made clear that the publishers and databases had no right to continue this business, the issue deserves consideration for infringements after that decision.

**B. The Logic of the Awards For Categories A, B and C Is Questionable.**

Category A is the largest award, apparently based on its requirement that the copyright owner have a registered copyright before an infringement. One can surmise that the larger award reflects the fact that such class members would have the right to recover statutory damages and attorneys' fees in their separate actions. However, there is a big difference between the definition of A as it appears in the Settlement Agreement and as it appears in the Notice. See, *supra* at p. 6. Claims that would be an A under the Copyright Act, or under the Settlement Agreement, are not A claims under the definition used in the Notice.

Category B is a much smaller award, but it is not clear why, at least based on copyright law. Category B requires that the article be registered before December 31, 2002.

The meaning of this date does not appear in any settlement related documents or pleadings. Other than this date requirement, the definition of B, in the Settlement Agreement, is that you have registered in time to be eligible under the law for statutory damages. So, if you have registered before December 31, 2002, and before an infringement started, you are eligible for Category B. There is no logic to the much smaller award if you meet the unexplained cut-off date and you are eligible to recovery statutory damages and attorneys' fees. As for A, the definition of B in the Notice requires that you have registered before **any** infringement. That idea, which is highly questionable in itself, would justify the lower amount. But that idea is at odds with a copyright owner's rights under the Copyright Act. Thus, the much lower award for B does not make sense for any owner who registered their copyright before any defendant commenced infringement of their work.

Category C is a very small award, compared to A or B. The apparent reasons are a failure to have the work registered before the first infringement and before December 31, 2002. The logic of the failure to have it registered before the first infringement is the same as for Category B, and comes from the definition in the Notice, not from the Settlement Agreement. The logic of the requirement of registration before December 31, 2002, is unknown, and not explained anywhere. A Category C work could still have been registered before some infringement by a separate defendant, thus entitling its owner to statutory damages and attorneys' fees.

### **C. There Are Problems of Breadth With the Release.**

The Release has highly questionable provisions suggesting it is too broad. (Settlement Agreement § 1.n.; page 7.) In addition to the defendants, it releases past and future parents [presumably meaning parent corporations], subsidiaries, affiliates (an undefined and vague

term) and divisions, and further releases the “nominees,” and licensees of a broad definition of released parties. Included in the broad definition are entities who were in the past, or may be in the future, a parent, subsidiary, affiliate or division, or the licensees of any of these unidentified parties. The appropriateness of releasing so many entities that are not parties to this litigation, and could have been, or still be, separate infringers of the works, needs to be justified. The idea of releasing parties who become a party’s subsidiary, affiliate, nominee or licensee sometime in the future seems utterly indefensible.

**D. Class Members Are Unable to Identify Themselves or Their Claim Category.**

The publishers did not tell the freelance writers they were transferring their works to a database. Database operators did not tell the freelance writers when one of their articles was distributed over the Internet. While many freelance writers may have learned of the practice over the years, there is no reason to believe that all, or even the majority, know what happened. The settlement procedures do not provide class members with any way for them to know if they are class members, or what category of claims they can make. Class members are expected to submit claims without knowing whether they are in the class, or in which categories they have claims.

The class is identified as the owners of a copyright “that has been reproduced, displayed, adapted, licensed, sold and/or distributed in any electronic or digital format, ... by a member of the Defense group or any member’s subsidiaries, affiliates, or licensees (a) at any time on or after August 15, 1997 (regardless of when the work first appeared in an electronic database) or (b) that remained in circulation after August 15, 1997, even if licensed prior thereto, including English language works qualifying for U.S. copyright

protection under an international treaty (hereinafter “Subject Work”).” This is a convoluted, difficult class definition that class members may not be able to apply by their own experience. You know if and when you bought a security in a securities class action. You know if you used a given drug, or were charged a given fee by your credit card. But how can a class member know about a practice that did not directly involve the class members?

How is a class member supposed to know that their work was dealt with as described? There is no source of this information provided to class members under the settlement. Many or most of the databases are subscription operations which the class member may not have used. The reproduction etc. has to be by a member of the “Defense Group” which is composed of 17 companies who are defendants, and at least 36 Participating Publishers. The list of 36 is available as an Exhibit to the settlement agreement, but that is not the end. A person is also a class member if any Defense Group’s “subsidiaries, affiliates, or licensees,” at any time after August 15, 1997, transferred the work. How is a class member to know who the subsidiaries, affiliates, or licensees are? What is the definition of an “affiliate” and even if business lawyers might have some idea what it means is there any reason to assume that all freelance writers know? The class member starts with at least 51 companies, and by the time you add the unknown subsidiaries, affiliates and licensees how many do you have? A hundred; a thousand? How does a class member deal with discovering an unknown licensee of a Defense Group member during 1998, or 2000? The class definition presents insurmountable administration problems, and appears unfair to the class.

There is a strong suggestion that the publishers sent the entirety of their publications to the databases during certain periods of time. Why would it not be better to define the class as all freelance writers published in the New York Times (and other listed publications)

between August 15, 1997 and the present? Muchnick is not in a position to know if this proposal, or something like it, will work, but it is apparent that the present class definition is cumbersome and difficult for class members to use. Class counsel should be required to justify why the complex definition of the class is appropriate.

**E. Are The Releases of Non-Parties Appropriate?**

Groups identified as Participating Publishers and Supplemental Participating Publishers are allowed to obtain releases from the class members by making contributions to the amount that the defendants have agreed to provide for the settlement. In substance, the defendants are syndicating the settlement. It appears that these “participating publishers” transferred articles to the databases. That would seem to make them additional infringers who were not sued in this action. The rationale of allowing them to obtain releases for their separate infringements for the same “price” as the defendants have agreed to, simply for sharing the defendants’ cost of settlement, is not clear. This should be thoroughly explained.

**VI. Due Process Requires That A Substantive Presentation of Fairness Be Available Before the Deadline For Objections or Opt Outs.**

As discussed above, the application for preliminary approval does not provide adequate information to support even a preliminary finding that this settlement is fair. If class members are required to decide if they will opt out, or object, in the absence of a properly supported preliminary finding by the Court that the settlement is fair, they will be denied due process. It is well established that the provisions of Rule 23 are intended to provide the constitutional protection of due process to absent class members. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). In the process of considering the settlement, a class

member should be able to have access to, and consider, the information presented to obtain preliminary approval.

**VII. The Procedure Established For the Award of Attorneys' Fees Does Not Comply With Rule 23.**

A 2003 amendment to Rule 23 requires that a claim for attorneys' fees by class counsel must be made by motion, and the motion must be directed to the class members in a reasonable manner. Fed.R.Civ.P. 23(h)(1). The Advisory Committee has provided guidelines for the application of this provision which have not been observed in Class Counsel's proposed procedures for the consideration of their application for an award of attorneys' fees and costs. "[I]t would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e)." Fed.R.Civ.P. 23(h), Advisory Committee Notes to 2003 Amendments. "In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." *Id.* Since the settlement already provides for the establishment of a website for information about the settlement, the motion for attorneys' fees and supporting information should be posted on that website well before objections are due.

The Memorandum in support of preliminary approval indicates that Class Counsel will seek an award of attorneys' fees based on the lodestar method. In the Second Circuit a party seeking an award of attorneys' fees must support that request with contemporaneous time records that show, "for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983). Even if Class Counsel chose to seek their fees based on the percentage

method, it recommended in this Circuit that the Court conduct a lodestar cross-check. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2<sup>nd</sup> Cir. 2000). Attorney fee awards include "those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998). The fee applicant has the burden of establishing the reasonableness of the expenses it seeks to recover; therefore, a failure to itemize the reasons for substantial expenditures is grounds for a reduction in the amount of an expense award. *GMC v. Villa Marin Chevrolet, Inc.*, 240 F. Supp. 2d 182, 189 (E.D.N.Y. 2002).

### **VIII. Conclusion.**

For the foregoing reasons the preliminary approval should be vacated. It would be a waste of money to incur the costs of notice in pursuit of a settlement approval which is fatally flawed. This motion does not necessarily present all the serious questions that may be presented by this settlement agreement. Movant and his counsel have rushed to bring these identified matters to the Court's attention as quickly as possible.

Dated: April 26, 2005

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CERTIFICATE OF SERVICE

I, Charles D. Chalmers, do declare:

I am over the age of eighteen and not a party to this action. On April 26, 2005, I served the following listed pleadings by email service addressed as below: MEMORANDUM IN SUPPORT OF MOTION TO VACATE PRELIMINARY APPROVAL AND MOTION TO ESTABLISH NEW PROCEDURES FOR FINAL APPROVAL AND AWARD OF ATTORNEYS' FEES

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I declare under penalty of perjury under the law of the United States that the foregoing is true and correct. Executed at Mill Valley, CA on April 26, 2005.

S/  
Charles D. Chalmers