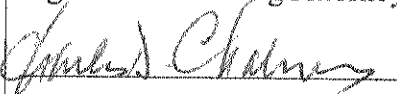


UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION INFORMATION STATEMENT

<p>Docket No. <u>No. 05-5943-cv</u></p> <p>Motion for: Strike Statements in Plaintiffs-Appellees' Petition for Panel Rehearing and Suggestion for Rehearing <i>En Banc</i>.</p> <p>Relief Sought: to strike outside the record factual assertion.</p> <p>Moving Party: <u>Irvin Muchnick, et al.</u> Appellants</p> <p>Moving Attorney: Charles D. Chalmers 769 Center Blvd., #148 Fairfax, CA 94930 415 860-8134 cchalmers@allegiancelit.com</p> <p>Court-Judge appealed from: <u>Hon. George Daniels</u></p> <p>Has consent of opposing counsel: A. been sought? Yes B. been obtained? No</p> <p>Is oral argument requested? No.</p> <p>Has argument date of appeal been set? <u>No</u> Date: <i>already argued.</i></p> <p>Signature of Moving Attorney  Date: <u>1-24-08</u></p>	<p><u>Caption</u></p> <p>In re Literary Works in Electronic Databases Copyright Litigation</p> <p>Opposing Party: <u>See Attachment</u></p> <p>Opposing Attorney: <u>See Attachment</u></p> <p><u>SDNY</u></p> <p>NOT AN EMERGENCY MOTION, MOTION FOR STAY OR INJUNCTION PENDING APPEAL</p> <p>Service has been effected; Proof of Service attached</p>
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ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED

FOR THE COURT
CATHERINE O'HAGAN WOLFE, Clerk

Date: _____

By _____

Attachment to T-1080

Opposing Party:

Plaintiffs: Michael Castleman Inc., E. L. Doctorow, Tom Dunkel, Andrea Dworkin, Jay Feldman, James Gleick, Ronald Hayman, Robert Lacey, Ruth Laney, Paula McDonald, P/K Associates, Inc., Letty Cottin Pogrebin, Gerald Posner, Miriam Raftery, Ronald M. Schwartz, Mary Sherman, Donald Spoto, Robert E. Treuhaft and Jessica L. Treuhaft Trust, Robert Treuhaft, trustee, Robin Vaughan, Robley Wilson, Marie Winn, National Writers Union, The Authors Guild, Inc. and The American Society of Journalists and Authors.

Defendants: Thomson Corporation, Thomson Business Information, The Dialog Corporation, Gale Group, Inc., West Publishing Company, Inc., Dow Jones & Company, Inc., Dow Jones Reuters Business Interactive, LLC, EBSCO Industries, Inc., Knight Ridder Inc., Mediasstream, Inc., Newsbank, Northern Light Technology Corporation, ProQuest Company, Reed Elsevier Inc., Union-Tribune Publishing Company.

Opposing Attorney:

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James F. Rittinger, Esq. Satterlee Stephens Burke & Burke LLP 230 Park Avenue New York, NY 10169 Attorneys for The Dialog Corporation, Thomson Corporation, Gale Group, Inc., West Publishing Company E-mail: jrittinger@SSBB.com	Robert J. LaRocca, Esq. Kohn, Swift & Graf, P.C. One South Broad Street, Suite 2100 Philadelphia, PA 19107 E-mail: mboni@kohnswift.com
Mathew W. Walch, Esq. Latham & Watkins Sears Tower, Suite 5800	Diane Rice, Esq. Hosie, Frost, Large & McArthur One Market, Spear Street Tower, 22 nd Fl. San Francisco, CA 94105 E-mail: drice@hosielaw.com

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Memorandum In Support of Motion

Introduction

Objectors' move to strike statements of fact in Plaintiffs-Appellees' Petition for Panel Rehearing *etc.* ("Petition") that are outside the record. Fed. R. App. Pro.

10. The two sentences involved are underlined:

One settlement term provided that, in the event the \$18 million payment cap were to be exceeded because more claims were filed than an anticipated, there would be a reduction of claim values beginning with Category C works. No party expected the cap to be reached, and in fact it was not. However, because of uncertainty created by an early report of the claims administrator, Appellees submitted corrected appellate briefs deleting statements that the payment cap would not be reached. (See docket entry dated 7/7/06 correcting docket entry dated 5/25/06 and docket entry dated 7/10/06 correcting docket entry dated 5/26/06). Prior to oral argument, the claims administrator completed its analysis of claims and determined unequivocally that the maximum aggregate claims value will not exceed the \$18 million payment cap.

Petition, p. 3, fnt 1. Judge Walker told the parties at oral argument that if the Court wanted the information it would let the parties know.

Background

The C Reduction is triggered by \$11.8 million in claims. The settlement is \$18 million, but \$5.2 million is allocated to costs. Earlier the parties stated that all "*prima facie* valid claims" were \$10.76 million. (Brief for Plaintiffs-Appellees, p.13, footnote 7; Brief for Defendants-Appellees, pp. 16, 25.) Objectors' questioned its accuracy. Declaration of Charles Chalmers ("Declaration"), ¶ 2. Days later plaintiffs' acknowledged that it was an understatement. *Id.*

Appellants Do Not Object To Properly Supplementing the Record

Objectors do not object to the information being presented, so long as it is accurate and verified. Reply, p. 7. In view of that offer, plaintiffs' unilateral violation of Rule 10 suggests an attempt to obscure something. Plaintiffs are using outside the record evidence to support their advocacy, while denying objectors, and the Court, with assurance that it is justified.

The History of Claims Evidence Suggests Caution

The parties presented partial claims evidence to the district court with projections which were way off the mark. Plaintiffs said the total settlement, with the \$5.8 million for fees and costs, would be "around the \$10 million minimum." (A 1446) That meant claims of \$4.2 million. Defendants said the partial claims indicated total claims "valued at roughly \$3.192 million." (A 1571) Then \$10.76 turned out to be too low. After two instances of inaccurate information, objectors ask only that they have the opportunity to examine the information, the underlying data and the process producing it, to insure accuracy.

The Court Said It Would Ask If It Wanted This Information.

The possibility of submission was considered during oral argument.

Counsel for Defendants:

..... A lot has happened since then. If the court were interested we would be glad to advise you of the present circumstance. But without that I think all that needs to be said is that what was before Judge Daniels gave him every confidence there would be no C Reduction.

Judge Walker:

Well .. would it bear ... If the information that you say you have now, that's updated, were before Judge Daniels would it, could it, affect his decision.

Counsel for Defendants:

He would only reaffirm his decision. He would reach precisely the same decision for precisely the same reason.

Judge Walker:

I think that, subject to what the presiding judge says, it seems to me that is relevant, I mean there has been debate about this, it is in the earlier briefs, so it is before us, the effect of arguments being made as to what the efficacy of the C Reductions is and how that might impact the case.

Counsel for Defendants:

I don't want to voluntarily insert the material in the record, but we do have a report from the claims administrator. If the Court would like it, I will make a representation now.

Judge Walker:

Oh ... We'll confer as to whether we wish to have that, and let you know. If we want it we will let you know.

Declaration, ¶ 4, Ex. C.

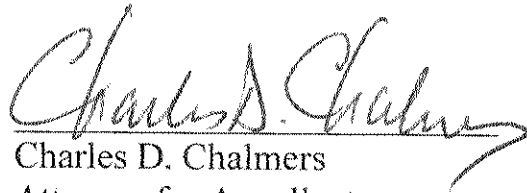
Claims Data Involves Contested Issues of Fact

If the record is supplemented, other relevant claims data should be provided. This would include total claims value, as well as the new totals for class representative claims. There should be a detailed explanation of the process that has produced any new information. If the Court thinks that the footnote indicates the claims process is complete, as objectors did, it would be mistaken. Declaration, Ex. B-2. Objectors want to be sure there are no misunderstood steps, or exercises of discretion, in reaching the new data.

Relief Requested.

Appellants' request the sentences be stricken, and that if the Court wants this information that the parties be ordered to provide appellants an adequate opportunity to examine the information and the process before its submission.

Dated: January 23, 2008


Charles D. Chalmers
Attorney for Appellants

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Literary Works in Electronic
Databases Copyright Litigation

No. 05-5943-cv

DECLARATION IN SUPPORT OF MOTION TO STRIKE

Charles D. Chalmers, do declare:

1. I am counsel for the appellants.
2. On June 20, 2006 I wrote to counsel for the parties questioning the accuracy of claims information they had inserted in their briefs. On June 30, 2006 plaintiffs' counsel wrote me an email to acknowledge the claims information was wrong, and was an understatement because the claims administrator had not counted claims, or reduced them to C category claims, when they might be valid or qualify for a higher category. A copy of the email is attached as Exhibit A.
3. On January 13, 2008 I wrote to counsel for plaintiffs and defendants asking for information about the assertions in footnote 1 of Plaintiffs' Petition about the total claims value. One of my questions was the actual total value, which is not in the footnote. A copy is attached as Exhibit B-1. On January 16, 2008, plaintiffs counsel responded that they would not provide any further information. A copy is attached as Exhibit B-2.

4. After the oral argument I obtained a recording of the argument.

Attached as Ex. C is a transcript I created of a portion of the argument in which the possibility of the Court requesting claims information was discussed.

5. Attached as Exhibit D is the claims administration memorandum, taken from the Joint Appendix.

Executed at Fairfax, CA on January 23, 2008. I declare under penalty of perjury under the law of the United States that the foregoing is true and correct.


Charles D. Chalmers

Dear Charles:

Prior to the filing of plaintiffs-appellees' brief, the parties asked the claims administrator to calculate the aggregate potential value of the claims, i.e., before those claims are sent to the defense group for its scrutiny under the terms of the Claims Administration Memorandum. Contrary to our clear instructions, and unbeknownst to us, the claims administrator provided us with a value that excluded claims that were the subject of a deficiency or ineligibility letter. That included reducing to Category C Subject Works that were claimed as registered works but lacked documentation and/or a registration number. We learned of this only after the June 16, 2006 deficiency letters went out. (A subsequent letter has since gone out that clarifies the claimants' registration documentation obligations. See www.copyrightclassaction.com.)

When we learned what the claims administrator had done, we decided we would have to strike those portions of our brief that reflected the inaccurate data, and that is what we intend to do. Contrary to the suggestion in your June 29 letter, we would never consider withholding correct information, and have every intention of informing the Court of the reasons for our filing a modified brief.

At this point, we have insufficient data to conclude that the \$18 million cap will be reached, and will not know this until after the claims have been examined by the defense group. It may well be that the prima facie claims with the deficiencies put back in will raise the number over \$18 million, and even if that is the case, the number may yet go down after the defense group examines the claims. It goes without saying that whatever information we have that pertains to the issues before the Court, we will provide the Court with such information.

Sincerely,

Michael J. Boni

Main Identity

From: "Charles Chalmers" <cchalmers@allegiancelit.com>
To: "Chuck Sims" <csims@proskauer.com>; "Michael Boni" <MBoni@bonizack.com>
Cc: "Tony Lee" <aklee@aklee.net>; "Robin Bierstedt" <robin_bierstedt@timeinc.com>; "Raymond Castello" <castello@fr.com>; "Michael S. Denniston" <mdenniston@bradleyarant.com>; "Michael Boni" <MBoni@bonizack.com>; "Kenneth A. Richieri" <richierk@nytimes.com>; "Jim Hallowell" <jhallowell@gibsondunn.com>; "James F. Rittinger" <Jrittinger@SSBB.com>; "Jack Weiss" <jmweiss@gibsondunn.com>; "Ian C. Ballon" <ballon@gtlaw.com>; "Hank Gutman" <hgutman@stblaw.com>; "Gary Fergus" <gfergus@ferguslegal.com>; "Dodson, Paulette R." <PDodson@tribune.com>; "Diane S. Rice" <drice@hosiellaw.com>; "Chuck Sims" <csims@proskauer.com>; "Christopher Graham" <cgraham@levettrockwood.com>; "A. J. De Bartolomeo" <ajd@girardgibbs.com>; "Mathew W Walch" <matthew.walch@lw.com>
Sent: Sunday, January 13, 2008 6:17 PM
Subject: Questions regarding Footnote 1 to Plaintiffs' Petition

For Michael:

I'd like to know the following by the close of business Monday:

1. Will you commit to provide me by the close of business Friday with an email copy of a declaration under penalty of perjury by the claims administrator showing:
 - a. the stage of completion of the claims process, with reference to the procedures described in the claims administration memorandum.
 - b. the basis of any assurance that the claims will not cause the settlement to exceed the \$18 M cap if the process is not complete through the final report, and an explanation of why the process is not complete;
 - c. the total dollar value of all claims as presented in the final report, or other report or calculation described in b?
2. Will you provide me by the close of business tomorrow your declaration under penalty of perjury that the statement in your footnote does not reflect a reduction in any other charge to the \$18 million settlement fund, such as the defendants' credit for notice, or the award of fees and costs?
3. If my clients so choose, will you stipulate to ask the Court to supplement the record with the information contained in such declarations, assuming they are provided?

For Chuck:

1. Assuming we reach stage 3 of the above, will defendants agree to that stipulation?

Main Identity

From: "Michael Boni" <MBoni@bonizack.com>
To: "Charles Chalmers" <cchalmers@allegiancelit.com>; "Chuck Sims" <csims@proskauer.com>
Cc: "Tony Lee" <aklee@aklee.net>; "Robin Bierstedt" <robin_bierstedt@timeinc.com>; "Raymond Castello" <castello@fr.com>; "Michael S. Denniston" <mdenniston@bradleyarant.com>; "Kenneth A. Richieri" <richierk@nytimes.com>; "Jim Hallowell" <jhallowell@gibsondunn.com>; "James F. Rittinger" <Jrittinger@SSBB.com>; "Jack Weiss" <jmweiss@gibsondunn.com>; "Ian C. Ballon" <ballon@gtlaw.com>; "Hank Gutman" <hgutman@stblaw.com>; "Gary Fergus" <gfergus@ferguslegal.com>; "Dodson, Paulette R." <PDodson@tribune.com>; "Diane S. Rice" <drice@hosiellaw.com>; "Chuck Sims" <csims@proskauer.com>; "Christopher Graham" <cgraham@levettrockwood.com>; "A. J. De Bartolomeo" <ajd@girardgibbs.com>; "Mathew W Walch" <matthew.walch@lw.com>
Sent: Wednesday, January 16, 2008 10:15 AM
Subject: RE: Footnote 1

Charles:

I responded within 24 hours of your Sunday night email to me. I stated, "We will respond to your email of January 13 later this week, as I was out most of today and will be out tomorrow for medical reasons." In fact, I was at the hospital both days for treatment of cancer. Your email below is astonishing in its disregard for my very pressing health issues, particularly when there is no deadline required of you to file anything. In fact, there is no procedure under which you are even permitted to file anything.

Notwithstanding your callous, discourteous style, we respond, as follows, to your January 13 email to Charles Sims and me:

We are unable to find any procedural support for your request. There is at present no issue before the Court but the jurisdictional holding of the panel decision.

If the Court agrees to rehear the appeal and seeks information with respect to the claims process, we will furnish it. The claims administrator's report will demonstrate that the aggregate value of the claims, after the claims administrator's review (but before any audits by defendants and the publishers, as is their right under the Settlement Agreement, which can only lower the aggregate claim value), together with all other approved fees and costs, will be less than \$18 million. There will be no reduction of any other charge in order to avoid a "C reduction."

We reject your suggestion that we misled the Court. You are incorrect that in our brief we present a "different, vague and tortured expression." We merely reported, in direct response to J. Walker's footnote, that there will be no C reduction.

Michael J. Boni
Boni & Zack LLC
15 St. Asaphs Rd.
Bala Cynwyd, PA 19004
610-822-0201
610-822-0206 (fax)
610-348-2526 (mobile)
mboni@bonizack.com

Counsel for Defendants:

..... A lot has happened since then. If the court were interested we would be glad to advise you of the present circumstance. But without that I think all that needs to be said is that what was before Judge Daniels gave him every confidence there would be no C Reduction.

Judge Walker:

Well .. would it bear ... If the information that you say you have now, that's updated, were before Judge Daniels would it, could it, affect his decision.

Counsel for Defendants:

He would only reaffirm his decision. He would reach precisely the same decision for precisely the same reason.

Judge Walker:

I think that, subject to the what the presiding judge says, it seems to me that is relevant, I mean there has been debate about this, it is in the earlier briefs, so it is before us, the effect of arguments being made as to what the efficacy of the C Reductions is and how that might impact the case.

Counsel for Defendants:

I don't want to voluntarily insert the material in the record, but we do have a report from the claims administrator. If the Court would like it, I will make a representation now.

Judge Walker:

Oh ... We'll confer as to whether we wish to have that, and let you know. If we want it we will let you know.

Between 12:01:45 and 12:03:20

EXHIBIT B - CLAIMS ADMINISTRATION MEMORANDUM

This claims administration process pertains to Subject Works authored in U.S. publications. Subject Works authored abroad may require some different or further information and/or process, to be mutually agreed by the parties. Terms used herein shall have the same meaning as in the Settlement Agreement.

1. The Claim Forms

a. Claim forms will be made available for submission by Claimants in either electronic form or paper form.

b. Plaintiffs will design the online and paper claim forms in a manner designed to make the claims making process as simple and convenient for the Claimant as practicable. The design of the claim forms shall be subject to the Defense Group's approval, and such approval is not to be unreasonably withheld.

2. Submission by Claimant

a. Each Claimant must submit a single claim form for all of his or her claimed Subject Works. Claimants should provide the following information to the extent reasonably possible:

i. Name and social security number of Claimant

ii. For each Subject Work claimed,

(1) Title of Subject Work used on first publication (as accurately as possible) or specific subject matter of the Subject Work sufficient to permit identification of specific articles;

(2) Name and publication date of newspaper or magazine publishing the Subject Work;

(3) If registration is claimed, registration number and date, together with a copy of either the registration certificate, or the registration application, or a printout from the Library of Congress web site showing registration number, date of registration or registration application, and publication date. (Some of this registration information is available at <http://www.copyright.gov/records/cohm.html>);

(4) Amount paid (if any) to the Claimant, by the publication, for the Subject Work (and attaching supporting material if conveniently available);

(5) For Subject Works authored in the United States, I with respect to

¹ For Subject Works first published in the United States, it will be the burden of the Participating Publisher or Supplemental Participating Publisher to show that they had the

each Subject Work claimed, a statement that the Claimant was not an employee or working under a "work for hire" agreement, but rather was working on a freelance basis;

(6) If the Claimant ever was an employee of that publisher, the approximate dates;

(7) Statement either that the Claimant has never had a written agreement granting electronic rights to that publisher with respect to any claimed Subject Works or, if he or she has ever signed such an electronic rights agreement with that publisher, providing a copy of such agreement (or stating the date of such agreement);

(8) Statement that no claim is being submitted for other versions, revisions, or variants of the Subject Work prepared without the Claimant's editorial assistance or for which the Claimant did not receive additional payment; and

(9) If known, databases on which Subject Work has appeared.

iii. A certification that, to the best of the Claimant's knowledge, information and belief, any and all information provided by the Claimant in connection with the claim is accurate.

b. The inability by Claimants to document their claims after a reasonable search for the documentation or to identify on which databases their Subject Works appeared shall not necessarily render such Claimants ineligible to receive his or her full Settlement Payment under the Plan of Allocation; claim allowance depends on sections 3-5 below.

3. Initial Claim Computation and Evaluation by Claims Administrator

a. The Claims Administrator will compute an initial per claim damage award per Subject Work, based on information provided. In making those computations:

i. Statutory damage eligibility requires registration certificate, printout or application reflecting timely registration or application for registration per 17 U.S.C. § 412(2);

ii. Eligibility for "registered" categories requires registration certificate or printout reflecting registration before December 31, 2002, and, for Category A Subject Works, a certificate or application dated either before publication or first infringement, or not more than three months after publication (Claims Administrator can search online and use the Library of Congress database to establish registration);

iii. Eligibility for and calculation of awards for Subject Works requires Claims Administrator to ascertain that each Subject Work:

necessary rights to reproduce Subject Works in electronic databases. For Subject Works first published abroad, it will be the burden of the claimant to show that the publisher of the collective work lacked sufficient rights to license the work to the defendant electronic database(s) for distribution thereby.

0726/44264-003 NYLIB1/1808739v1

(1) Has been distributed or displayed by a Defense Group member;²
(2) Is not self-evidently excluded from the class definition and settlement agreement (*i.e.*, software); and

(3) Was published either after January 1, 1995; between January 1, 1985 and December 31, 1994; prior to January 1, 1985; or prior to 1978, in order to determine any reduction in payments due to the time period in which the Subject Work was created.

iv. A claim submitted by a Claimant will be eligible to be processed and assessed by the Claims Administrator if it identifies (i) a specific identifiable publication, (ii) a particular date or dates (although precision is not required), and (iii) title or subject matter sufficient to permit identification of particular Subject Works to which the Claimant is referring. By way of example:

-Four articles by Jack Smith in Newsweek in 1985 on soccer, Uruguay, Clifford Irving, and the Amazon² suffices to comprise four claims that can be processed and assessed;

-Articles in Sports Illustrated from 1982-1989, or Articles in various publications during the 1980s² fail to provide sufficient information to be processed, and will be disallowed.

v. The Claims Administrator will e-mail to Plaintiffs' Lead Counsel and the Defense Group a Weekly Report that will contain, among other things, the claims presented to the extent they appear valid, the computation of initial claim awards, and disallowed or disputed claims (*see infra* paragraph 4.a.).

4. Review by Publishers or Databases

a. Each Participating Publisher and Supplemental Preliminary Participating Publisher will have 30 days – or, if the publisher has received more than 150 claims, 45 days – to object to the inclusion of any or all Subject Works listed in a given claim, by certifying that any material fact submitted by the Claimant is false (*e.g.*, the claimed Subject Work was never published, is not a Subject Work under the Settlement Agreement, was written for \$20, not \$250; the Claimant was an employee; the Subject Work is subject to an applicable written grant of electronic rights, or that the work is otherwise ineligible).

b. Objections should be supported by demonstrative evidence that the claim is invalid, if such evidence is in the publisher's possession, custody or control at the time of the

² The Claims Administrator will have access to lists (including electronic, searchable lists when available) of publications that have been online and the pertinent dates. Having ascertained that the relevant issue of the publication was online, the Subject Work would be presumed to have been online, subject to the demonstration by the publisher (*see step iv.*) that the Subject Work (or category of Subject Works of which the Subject Work is a part) never was part of the text distributed online, or was not published by it at all (*i.e.*, did not exist).

objection, but it is recognized that such evidence may not exist or be obtained with reasonable effort, and other evidence (e.g., declarations by employees or officers of the publication) may suffice. Evidence may pertain to the publisher's general policies and practices, and does not need to specifically gainsay facts contained in the claim.

By way of example:

- A publisher can support an objection to a claim with a copy of a written grant of electronic rights from the Claimant covering the Subject Work in question. Such documentation would lead to rejection of the claim, unless the Claimant can successfully cast doubt on the authenticity of the grant.
- A publisher can support an objection to a claim with a certification or other evidence that a check of its records reflected no such Subject Work had been published by that publication, or that that Claimant did not author the work. Such documentation would lead to rejection of the claim, unless the Claimant can successfully cast doubt on the certification and/or evidence.
- A publisher can support an objection to a Subject Work it believes was never carried on a defendant database with demonstrative evidence or, if it does not exist or cannot be located with reasonable effort, a certification, that it routinely followed a policy of submitting to a database only works by staff writers or articles for which it had in hand written grants of electronic rights, and that freelance works without written rights were routinely excluded from uploading to the database. Such documentation would lead to rejection of the claim, unless the Subject Work was in fact on a defendant database or the Claimant can otherwise successfully cast doubt on the certification and/or evidence.

c. The Claims Administrator shall notify the Database Defendants of all claims which appear not to have been reviewed by Participating or Supplemental Participating Publishers. Once the Database Defendants are notified by the Claims Administrator that no objection was obtained from a publisher with respect to claims presented to that publisher, the defendant database will have up to 45 days – or, if a database has more than 1000 claims to review, up to 60 days – to object to any such claims. Such objections should be supported by demonstrative evidence to the extent reasonably available, or, if not, certifications, establishing that such articles were not distributed, displayed, or transmitted by such database, or that the work is otherwise ineligible.

vi. Claims not objected to in a timely manner, or not found invalid on their face by the Claims Administrator, will be paid pursuant to paragraph 7 below.

vii. Contested claims will be put aside for resolution (see 5 below).

5. Dispute Resolution

- a. Plaintiffs' Lead Counsel and the Defense Group will be notified by the Claims Administrator of disallowed or disputed claims.
- b. The parties will attempt informally to resolve all disputed claims on a rolling basis.
- c. Claimants submitting a disallowed claim will receive a letter explaining the reason(s) for the disallowance, and will be afforded an opportunity to cure any deficiencies so as to render the claim valid.
- d. If the parties are unable to resolve all disputed claims, the remaining disputed claims will be resolved by binding arbitration. The arbitration panel shall consist of Kenneth Feinberg, one designee of plaintiffs and one designee of the Defense Group. The arbitrations will be set at the earliest possible date after the end of the claims period, and shall be conducted sequentially on one day (or consecutive days) at an agreed to location in New York City. The Claimant may participate by telephone.

6. Final Report.

The Claims Administrator will prepare a final report, for distribution pursuant to ¶ 3.c. of the Settlement Agreement. The Final Report will list, for each Claimant, the Subject Works deemed valid, the original publication of each Subject Work, the amount per Subject Work under the Plan of Allocation, and the total Settlement Payment.

7. Payment of Claims

- a. Upon receipt of all outstanding amounts due pursuant to the terms of the Settlement Agreement according to the procedures set forth in 3(c) of that agreement, the Claims Administrator shall prepare a single check for each claimant for the total amount due that Claimant as described in the Final Report.
- b. The Claims Administrator shall mail each check by first class mail to the address provided by the Claimant in the claim form. In the event that checks are returned as undeliverable or are not cashed or deposited after 90 days ("Unclaimed Funds"), after one good faith effort to resend the check via publicly available information on the Internet, and subject to Court approval, the Claims Administrator shall disburse any Unclaimed Funds pursuant to a *cypres* motion made by plaintiffs. The parties will agree to the proposed recipient of the award.

CERTIFICATE OF SERVICE

I, Charles D. Chalmers, do declare:

I am over the age of eighteen and not a party to this action. On January 24, 2008, I served the foregoing motion, by first class mail postage prepaid, addressed to Charles Sims for Defendants and Michael Boni for plaintiffs, and by email to all persons listed below.

Charles S. Sims, Esq.
Proskauer Rose LLP
1585 Broadway
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Attorneys for Reed Elsevier Inc.
E-mail: csims@proskauer.com

Henry B. Gutman, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
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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 Fairfax, CA on January 24, 2008.


Charles D. Chalmers