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August 1, 2006

Clerk of the Court
U.S. Court of Appeals, Second Circuit
40 Foley Square
New York, NY 10007
Attn: Julius D. Crockwell

Re: IN RE: LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT LITIGATION 05-5943-cv

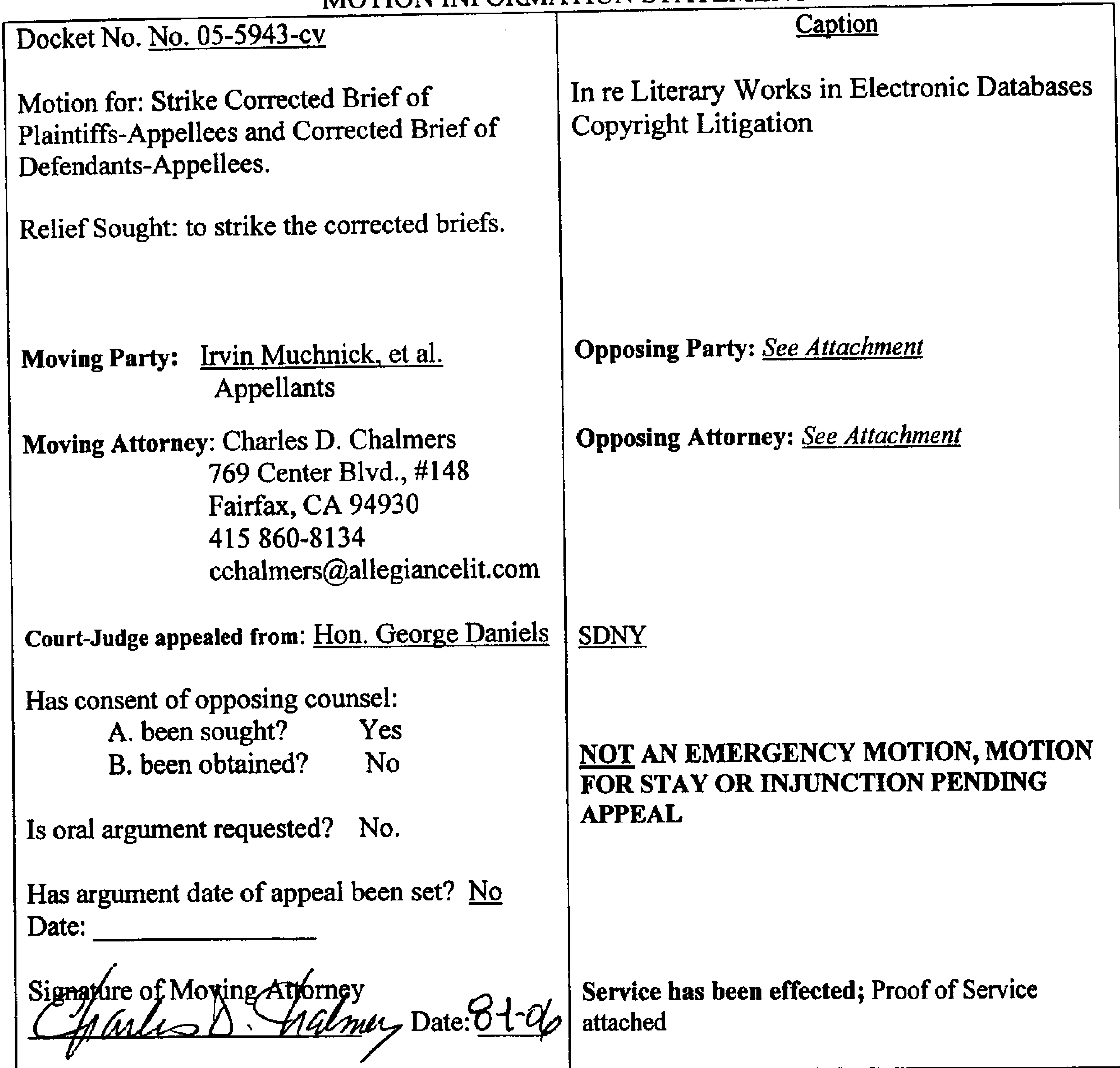
Dear Mr. Crockwell:

Enclosed for filing are an original and 3 copies of Motion to Strike Corrected Brief of Plaintiffs-Appellees and Corrected Brief of Defendants-Appellees. There is also an extra extra copy of the page T-1080. Please note the filing on that and return in the envelope provided.

Sincerely,

Charles D. Chalmers

cc: All counsel



UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION INFORMATION STATEMENT

	Caption
Docket No. No. 05-5943-cv	
Motion for: Strike Corrected Brief of Plaintiffs-Appellees and Corrected Brief of Defendants-Appellees. Relief Sought: to strike the corrected briefs.	In re Literary Works in Electronic Databases Copyright Litigation
Moving Party: Irvin Muchnick, et al. Appellants	**Opposing Party:** *See Attachment*
Moving Attorney: Charles D. Chalmers 769 Center Blvd., #148 Fairfax, CA 94930 415 860-8134 cchalmers@allegiancelit.com	**Opposing Attorney:** *See Attachment*
Court-Judge appealed from: Hon. George Daniels	SDNY
Has consent of opposing counsel: A. been sought? Yes B. been obtained? No Is oral argument requested? No. Has argument date of appeal been set? No Date: ______________	**NOT AN EMERGENCY MOTION, MOTION FOR STAY OR INJUNCTION PENDING APPEAL**
Signature of Moving Attorney Charles D. Chalmers Date: 8-1-06	**Service has been effected;** Proof of Service attached

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED

FOR THE COURT
ROSEANN B. MacKECHNIE, Clerk of Court

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., Mediastream, Inc., Newsbank, Northern Light Technology Corporation, ProQuest Company, Reed Elsevier Inc., Union-Tribune Publishing Company.

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Memorandum In Support of Motion

I. Introduction

Extraordinary events have occurred. Without action by this Court there will be a miscarriage of justice, so appellants frame the issues in this motion to strike the "corrected" briefs of the appellees.

Appellees' briefs, before "correction," contain statements of post-judgment, outside-of-the-record, facts. The facts are the total value of class member claims against the settlement, and the number of named plaintiff claims in the different compensation categories. Appellees said these facts rendered the appeal "absurd" and moot. Then Appellants questioned the accuracy of the facts and Appellees admitted they are wrong. They then filed "corrected" briefs, excising the facts and related arguments.

The facts, and appellees' explanation for the error, are dramatic admissions that demonstrate that the parties misled, intentionally or mistakenly, the district court. These admissions should be considered on the appeal. These events raise the specter of bad faith by the appellees and they refuse to dispel this cloud on the judicial process with a candid explanation.

II. Background

This is an appeal of a class action settlement approval. A settlement provision called the "C Reduction" figures prominently. Appellants, objectors to

the settlement, objected to it and argue on appeal that it is unfair and evidence of inadequate representation of the class. (Brief For Objectors-Appellants, pp. 15-16, 26-31.) Appellees (plaintiffs and defendants) defended the C Reduction below by asserting their certainty that it would never be implemented. "[T]he risk is exceedingly remote." (A490) "[N]o basis in reality." (A611) "As a factual matter there is no chance …" (A1446) [I]t appears inconceivable …" (A1571)

The C Reduction reduces the compensation of one of three compensation categories, the C category, if the total value of all claims for three categories (A, B & C) exceeds the net settlement amount available for claims. That amount is the "trigger" and it is \$11.8 million. The total settlement is \$18 million, but \$6.2 million goes to attorneys' fees, claim administration, and cost of notice to the class.

The plaintiffs and defendants filed separate briefs. Both stated the total, final value of all class member claims, assuming the claims to be valid. They said the value of all "*prima facie* valid claims" was \$10.76 million. (Brief for Plaintiffs-Appellees, p.13, footnote 7; Brief for Defendants-Appellees, pp. 16, 25.) The parties made strong arguments based on these new facts. Defendants argued:

> It would be absurd to reverse class certification on this ground, since the claim period expired last September and the submitted claims as reported by the claims administrator make plain that there will be no C reduction whatever, even if every claim asserted were valid.

(Brief for Defendants-Appellees, p. 25.) Defendants confirmed that the meaning of "*prima facie* valid claims" is "if every claim asserted were valid" in the above

quote. In other words, they said that $10.76 million was as high in value as the claims could ever be. Plaintiffs said these facts made the C Reduction argument moot. (Brief for Plaintiffs-Appellees, p. 37, ftnt 15.)

III. The Claims Administrator's Reports

The Claims Administrator is required by the settlement to provide reports to the plaintiffs and defendants about the claims. (Claims Administration Memorandum ("Memorandum")(A383 – A387) It requires the Claims Administrator to "compute an initial per claim damage award per Subject Work." (A384, ¶ 3.a.) A claim must provide documentation of copyright registration to be eligible for the A and B categories [higher value claims] in this initial computation. (*Id.* ¶ 3.a.i. and ii.) This point is the key to a great sense of disquiet that arises when one considers the events addressed by this motion. This Administrator report presents, by definition, a lower value than "*prima facie* valid claims" definition. It is a lower number because the registration documentation defect is curable. The Claims Administrator was to e-mail a weekly report to the counsel for plaintiffs and defendants stating this "computation of initial claim awards." (A385, ¶ 3.a.v.) For the rest of this memorandum, movants use "*initial claim awards report*" to refer to this Administrator's report.

The importance of the *initial claim awards reports* is described below, as it features significantly in the possibility that the parties have misled both this Court

and the district court. The single most important aspect of the reports is that they, by definition, would understate the value of initial claims, by not counting claims for Categories A and B if the required registration documentation was not present. But this is a curable defect, so it is not a proper indication of total claims value.

IV. Appellees' Factual Statements Were Wrong.

Appellants filed a Reply, addressing appellees' outside-of-the-record factual assertions. Appellants also objected, stating they would stipulate to supplementing the record with this information if it were "sufficiently complete and verified." (Combined Reply For Objectors-Appellants, p. 7.)

Thereafter appellants learned of actions by the Claims Administrator that called into question the accuracy of the claims value the parties stated in their briefs. Their counsel wrote to appellees' counsel:

> Some of my clients (at least 5) have received letters from the Claims Administrator stating that their claim(s) are defective in some respect. They are given approximately 30 days to provide a correction. Please advise at the earliest possible time whether the claims of class members who have been sent, or will be sent, these notices are included in the term "prima facie valid claims" as used in the plaintiffs' brief.

(Declaration, Exhibit B, p. B 1.)[1] Ten days later plaintiffs' counsel acknowledged that the information was wrong.

> Prior to the filing of plaintiffs-appellees' brief, the parties asked the claims administrator to calculate the aggregate potential value of the

[1] "Declaration" herein refers to the accompanying Declaration of Charles Chalmers In Support of Motion.

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.

(Declaration, Exhibit B, p. B 9-10.) (emphasis added)

This means that the value of the "*prima facie* valid claims" is in excess of $10.76 million by some unknown amount. The $10.76 million number was already inconsistent with the contention that the C Reduction had no chance of occurring because $10.76 is only $1 million less than the $11.8 million trigger. Coming within 91% hardly equates to "no chance" or "inconceivable." Plaintiffs' counsel captures the importance of the mistake: "It may be that the prima facie claims with

the deficiencies put back in will raise the number over $18 million; ...." By "over $18 million" he means in effect over the $11.8 million trigger. In other words Appellees state that the C Reduction may occur, instead of being "moot" or "absurd".

The special report plaintiffs' counsel received from the Administrator is exactly, or essentially, the "*initial claim awards report*" required from the Administrator, which counsel for plaintiffs and defendants received weekly until the end of the claims period. Like the "*initial claim awards report*" the special report understated the final value of claims.

The appellees filed "Corrected" briefs. These are their original briefs with the outside-of-the-record factual assertions, and related arguments, deleted and other changes made to adjust for the deletions. Appellants wrote the Clerk opposing this filing but their counsel was advised by a deputy clerk that the Clerk's Office had decided to file the "corrected" briefs, and that appellants' remedy was a motion to strike.[2]

V. These Are Not Corrections

This situation results from a flagrant violation of the Rules. The facts were outside the record. Fed. R. App. P. 10. Factual assertion without record references

[2] The Deputy Clerk explained that the Clerk's Office did not feel that it should be responsible for determining what was, or was not, a "correction" as opposed to a revision. Declaration, ¶ 5.

has been the basis for sanctions. *Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1583 (Fed. Cir. 1990)(sanctions for, *inter alia*, "statements of fact with no record reference; statements of fact for which there is no record; reliance on attorney argument and counsel's unsworn fact statements as 'evidence'"); *see also, Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999). The Rule provides for modification of the record in explicit ways, and requires all other questions regarding the content of the record to be presented to the court of appeals. Fed. R. App. P. 10(e)(3).

These are revised briefs, not corrections. Appellants' Reply does not match these "corrected" briefs. Substantial parts will be meaningless when read against the "corrected" briefs. (Declaration, ¶ 3, Exhibit A.) In fairness to the Court, as well as to appellants, if the new briefs by appellees stand, the appellants should file a new reply. This occasions both extra work, and delay.

Corrections are for incorrect citations to the record or legal authority[3], or the correction of a failure to observe the rules regarding required content or form. The Rules contain a strong indication that substantive corrections are not allowed without permission of the court. In the Rule dealing with the situation where briefs

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[3] Plaintiffs-Appellees present an "release" argument based on a citation to *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591 (1997). (Brief for Plaintiffs-Appellees, p. 28; Corrected Brief for Plaintiffs-Appellees, p. 28.) There is nothing in that opinion remotely like the citation, and Appellants pointed that out in their Reply. (Combined Reply For Objectors-Appellants, p. 24.) If truly interested in correcting their brief the Plaintiffs could have addressed that citation.

are filed before the appendix is prepared, the parties are allowed to submit new copies of their briefs citing to the appendix. Fed. R. App. P. 30(c)(2). The Rule states: "Except for the correction of typographical errors, no other changes may be made to the brief." *Id.* The Supreme Court rule is even more emphatic: "No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected." Supreme Court Rule 26(4)(b).

It is the common practice in the courts of appeal that the filing of a corrected brief is done by order of the court. *See, e.g. Cobell v. Norton*, 2006 U.S. App. LEXIS 9322, *1-*2 (D.C. Cir. 2006); *Tyler v. Missouri Highways and Trans. Comm.*, 160 Fed. Appx. 547, 2005 U.S. App. LEXIS 28553, **2 (8th Cir. 2005); *Williams-Lindsey v. National Car Rental System, Inc.*, 2005 U.S. App. LEXIS 21697, *1 (7th Cir. 2005); *Lyons v. Red Roof Inns, Inc.*, 130 Fed. Appx. 953, 957, 2005 U.S. App. LEXIS 9272 (10th Cir. 2005); *Ray v. Koester*, 85 Fed. Appx. 983, 984; 2004 U.S. App. LEXIS 839, **2 (5th Cir. 2004); *Julien v. County of Alameda*, 46 Fed. Appx. 528, 529; 2002 U.S. App. LEXIS 20172, **3 (9th Cir. 2002); *United States v. Arora*, 43 Fed. Appx. 598, 2002 U.S. App. LEXIS 16138, **1 (4th Cir. 2002); *Tan-Gatue v. Office of Pers. Mgmt.*, 44 Fed. Appx. 484, 2002 U.S. App. LEXIS 17918 (Fed. Cir. 2002).

VI. Appellants Should Be Permitted to Rely on Appellees' Admissions

The announcement that *prima facie* valid claims were $10.76 million, was a damning admission against the argument that plaintiffs agreed to the C Reduction because they were "certain" is would never occur. $10.76 is 91% of the $11.8 trigger for the C Reduction. Now, the admission that *prima facie* valid claims is some value greater than $10.76 million, possibly over $11.8 million, is an even stronger admission.

Another of appellees' outside-of-the-record factual statements is that the named plaintiffs as a group submitted 1,355 A claims, 115 B claims and 3,698 C claims. (Brief for Plaintiffs-Appellees, p. 35, ftnt 12.) This is directed to the objection that the named plaintiffs, who hold a substantial number of registered copyright claims, were unrepresentative of the 99% of the class who hold unregistered claims. Appellees argued that this claims information showed that the named plaintiffs had substantial unregistered claims and thus were sufficiently representative. In the Reply appellants showed that A claims of the named plaintiffs were worth approximately $1.6 million, while the C Claims were worth about $185,000. (Combined Reply For Objectors-Appellants, p. 8-9.) They demonstrated that the named plaintiffs would suffer far more from a *pro rata* reduction if claims were greater than the settlement than they would from the C Reduction, even with their C claims. (*Id.*)

The fact that named plaintiffs have $1.6 million in registered claims is dramatic. We don't know the final number of total claims, but we do know that there were 1220 claims by September 13, 2005. (A 1541) Given the tremendous increase in value between September 13, 2005 and September 30, 2005, there must have also been a tremendous increase in the number of claims. But just using the 1220 figure, we see that 23 named plaintiffs, or 1.9% of the claims, would be taking 13.5% of the total settlement value.

The mistake disclosure shows it is possibly far worse. This statement of the error in their "facts" carries explosive importance. The Claims Administrator reduced "to Category C Subject Works that were claimed as registered works but lacked documentation and/or a registration number." (Declaration, Exhibit B, pp. 9-10.) That means that the named plaintiffs' 3,698 C claims may really be much more valuable A or B claims. They may be entitled to much more than 13.5 percent of the settlement.

The factual disclosures by the parties support the appellants' arguments and they should be considered. It would deny the appellants' due process rights to prevent them for using these factual admissions against interest.

VII. The Corrected Briefs Should Be Stricken

The "corrected" briefs should be stricken. Should the Court permit the corrected briefs, appellants should be given leave to file a revised Reply.

Appellants believe that the proper procedure is to strike the corrected briefs, and allow appellees' explanations of the reasons the information is wrong to be part of the record. This is appropriate for these reasons:

1. These are highly relevant factual admissions. There is no prejudice to the appellees to have their original briefs stand, as they choose to make the statements. There is no prejudice to the Court, since the court is advised of how the first statements are flawed.

2. As it stands there is ambiguity about the record in this appeal. If the "corrected" briefs remain, the question is raised as to whether the statements by the appellees in their original briefs are still part of the record. Normally, if something is to be removed from the record, either in a trial court or a court of appeals, it is by a motion to strike.

3. It expedites this already substantially delayed appeal.

Appellants first thought that striking the outside-of-the-record facts was the appropriate step, and proposed a stipulation to do that. (Declaration, ¶ 6.) This was before they were told that the facts were wrong. (*Id.*) The importance of the information, which confirms an even greater likelihood that the district court was misled about the possibility of the C Reduction, convinced them the information should stand in the record of this appeal. (*Id.*) They also believed that process

would provide an opportunity for a more satisfying explanation of why appellees' presented outside-of-the-record information that turned out to be inaccurate.

VIII. The Appellees' Actions and Explanations Are Questionable

Counsel for all parties went through the process of determining the record for a Joint Appendix in March 2006. (Declaration, ¶ 2.) By that time the appellees' counsel had the last of the "*initial claim awards reports*" required by the Memorandum which would state the final value of the claims except for defective but curable claims. They never mentioned supplementing the record. (*Id.*)

Appellees' counsel are experienced. They know that inserting outside-of-the-record facts in their briefs is improper, and sure to provoke close examination. Would they not have taken steps to insured the accuracy of the information? They knew that the proper procedure was to ask appellants for a stipulation.

The error allegedly made by the Administrator was plainly in front of them before they used the information. The mistake they say the Administrator made produced a report exactly like the one called for by the Memorandum, which they had received weekly throughout the claims period. The faulty $10.76 million figure had to be virtually the same figure they had received in the last weekly report after the close of the claims period. Is it believable that they did not observe this, thereby being alerted to the "mistake" of the Administrator?

Appellees did not reveal the error until challenged. Appellants' counsel asked if the figures were wrong on June 20th. (Declaration, Exhibit B, p. B 1.) He did not receive an answer until June 30th. (Declaration, Exhibit B, p. B 9-10.) The reason given for the delay was that counsel for defendants was out of town. (Declaration, Exhibit B, p. B 2.) To get that answer he had to write:

> I must have the truth immediately. I hope to receive from you both a clear explanation of the true facts today. I will not further delay any action that appears appropriate under the circumstances.

(Declaration, Exhibit B, p. B 8.) Prior to that, on June 28th, the plaintiffs and defendants tried to agree to the idea of a stipulation to strike the new facts without explaining whether they were right or wrong. (Declaration, Exhibit B, p. B 4-5.) Appellants' counsel responded to that:

> [P]lease respond to my first letter of June 20th. As I read the settlement administration memorandum, the Administrator's initial review of the claims counted claims for registered works submitted without documentation as C claims. If that methodology resulted in the figures that you stated we have a problem beyond simply striking improper material from a brief.

(Declaration, Exhibit B, p. B 6.) Still it was two more days, and only after the threat quoted above, that appellees disclosed that the information was wrong.

The parties deny that appellants played any role in discovery of the error of the facts in their briefs. (Declaration, Exhibit B, p. B 17.) Yet, when appellants' counsel raised the question, counsel for plaintiffs-appellees said he could not answer because counsel for defendants-appellees was out of town. (Declaration,

Exhibit B, p. B 2.) Ten days later, it is the same counsel for plaintiffs-appellees who provided the explanation. (Declaration, Exhibit B, p. B 9-10.)

This history is disquieting. Appellants asked for an explanation of these events. They posed several questions, including:

> 1. What is the explanation from the Administrator for its failure to provide the calculation that you explicitly requested?
> 2. Have you received the reports called for by the claims memorandum?
> 3. Assuming that you have, it seems the number presented in the last report, covering all filed claims, would be very similar to the one you reported believing that it was a different calculation. Didn't anyone notice the similarity, and if not, why not?
> 4. Why didn't you tell me about the problem when I first raised the question, instead of waiting more than a week and providing it only when I threatened a motion.

(Declaration, Exhibit B, p. B 15-16.) The appellees refuse to answer or provide any information which would explain the events, saying it was an effort at "discovery." (Declaration, Exhibit B, p. B 17.)

The events arouse suspicion, and the matter is too important to ignore. The appellees say that appellants' counsel had nothing to do with their discovery that the information was wrong. That means they knew it was wrong before his letter of June 20th. Why did they delay disclosing it until June 30th? Why do they refuse to candidly describe what has actually happened? In light of the seriousness of what has transpired, and the circumstantial evidence that raises questions about appellees' actions and intentions, requiring a more detailed explanation is appropriate.

IX. Relief Requested.

Appellants request that the corrected briefs of appellees be stricken.

Dated: August 1, 2006

Charles D. Chalmers
Attorney for Appellants